Petition

81-1085

No.

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In the Supreme Court

OF THE

United States

OCTOBER TERM, 1981

ANGELO SANGIACOMO, et al.,
Petitioners,

vs.

IRMA ZIGAS, et al.,
Respondents.

PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

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QUESTIONS PRESENTED

The Court of Appeals of the State of California has held that California may apply its own law to the interpretation and construction of a standard printed form federal contract produced by and for the United States Department of Housing and Urban Development (hereafter "HUD"). This contract is used by HUD in all 50 states to implement the national program of housing mortgage insurance under the National Housing Act, 12 U.S.C. § 1701 *et seq.* (hereafter the "NHA"). The contract is entitled "Regulatory Agreement for Multi-Family Housing Projects (under Sections 207, 220, 221(d)(4), 231 and 232, Except Nonprofits), FHA Form No. 2466" (hereafter "Regulatory Agreement").

Calling the issue one of first impression, the Court of Appeals held that under state law principles, such contract creates a private right of enforcement in third parties.[1] However, several Federal Courts of Appeal have held that this standard printed form contract must be interpreted

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[1]The following is a list of all parties to the proceeding below:

(a) Plaintiffs below include Irma Zigas, Arthur L. Zigas, Constance C. Porter, and Lee Glanzman. Plaintiffs have attempted to sue "on behalf of themselves and all others similarly situated," but there has never been a certification of the class by the trial court.

(b) Defendants below include Angelo Sangiacomo, Two Thousand Broadway, a limited partnership, Trinity Properties, Inc., a corporation; and Trinity Management Services, a corporation. The principal officers, directors, general partner, limited partner, and shareholders of which are Angelo Sangiacomo, his wife, Yvonne Sangiacomo, and his sister, Rosetta Sangiacomo. There are no known parent, subsidiary or affiliate corporations other than those listed herein.

and construed according to federal law, and that federal law prohibits any third-party enforcement of the contract's provisions. The Supreme Court of California has denied a hearing on the issue.

The questions presented are:

(1) Whether the federal interest in uniform construction of the Regulatory Agreement used by HUD to implement the NHA necessitates its being interpreted solely in accordance with federal law, regardless of the forum chosen;

(2) Whether federal appellate decisions prohibiting private third-party enforcement of the Regulatory Agreement preempts California's creation of such enforcement rights under state contract law principles;

(3) Whether such state-created, third-party right of enforcement of the Regulatory Agreement interferes with the broad discretion vested in the Secretary of HUD by Congress to administer the national program of federal housing mortgage insurance under 12 U.S.C. § 1701 *et seq.*;

(4) Whether tenants of federally insured housing projects may, directly or indirectly, subject the Secretary to involvement in litigation and the possibility of having to assume direct control of an insured project, through foreclosure proceedings or otherwise, by suing to enforce the Regulatory Agreement when the Secretary has not declared a default thereunder;

(5) Whether, in view of the fact that HUD's enforcement of the Regulatory Agreement is an agency function not judicially reviewable pursuant to 5 U.S.C. §§ 551(13) and

701(a)(2), California may create a private right of enforcement thereof under state law;

(6) Whether the Regulatory Agreement, which directly embodies HUD Regulations and is the instrument for their enforcement pursuant to 24 C.F.R. § 207.18(c), may be subjected to varying interpretation under state law principles;

(7) Whether, once a HUD-insured loan has been fully repaid, *any* third-party right of enforcement of the Regulatory Agreement can exist.

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Respondents.

PETITION FOR WRIT OF CERTIORARI to the Supreme Court of the State of California

CITATION TO THE OPINION OF THE CALIFORNIA COURT OF APPEAL

The decision below is *Zigas v. Superior Court of the State of California in and for the City and County of San Francisco,* 120 Cal.App.3d 827, 174 Cal.Rptr. 806.

GROUNDS ON WHICH JURISDICTION IS INVOKED

The Court of Appeal of California, First Appellate District, filed its opinion granting a writ of mandate on June 24, 1981. A timely petition for rehearing was denied on July 24, 1981. On September 10, 1981, the Supreme Court of California denied a timely petition for hearing. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3).

CONSTITUTIONAL PROVISIONS, STATUTES AND REGULATIONS WHICH THE CASE INVOLVES

Administrative Procedure Act

5 U.S.C. § 551 (13)

5 U.S.C. § 551 (14)

5 U.S.C. § 701 (a)(2)

National Housing Act

12 U.S.C. § 1713

12 U.S.C. § 1731a

24 C.F.R.

§ 207.18(c)

§ 207.19(e)

These provisions are set forth in full in the appendix hereto.

STATEMENT OF THE CASE

Petitioners were mortgagors under a mortgage insured by HUD pursuant to the NHA, specifically 12 U.S.C. § 1713. The mortgage documents included a standard printed form HUD agreement entitled "Regulatory Agreement for Multi-Family Housing Projects (Sections 207, 220, 221 (d)(4), 231 and 232, Except Nonprofits), FHA Form No. 2466." This Regulatory Agreement was drafted by HUD pursuant to 24 C.F.R. § 207.18(c) to effectuate the purposes of the NHA. This Regulatory Agreement was dated December 7, 1971. The mortgage itself was paid in full on or about July 1, 1979.

On May 30, 1979, Respondent tenants of the federally insured apartment building commenced Action No. 754-035 against Petitioners in the Superior Court of the State of California, in and for the City and County of San Francisco. Such tenants alleged claims for damages, specific performance, injunctive and declaratory relief based on a private right of enforcement as "third party beneficiaries" under the aforementioned Regulatory Agreement, the NHA and the Regulations promulgated thereunder. Also alleged were certain state statutory causes of action. The sole allegation supporting the third party beneficiary claims is that the rent and other charges to Respondents were in violation of the Regulatory Agreement and in excess of the HUD-approved rent schedule.

Petitioners demurred on the basis that under federal and state law no third party cause of action could be based on, or derivative of, a federally insured housing mortgage and related agreements under the National Housing Act. On October 25, 1979, the trial court issued its ruling partially sustaining the demurrer. The trial court's ruling had the effect of eliminating all claims based on, or derivative of, the NHA, the Regulations promulgated thereunder, and/or the federal mortgage insurance agreements.

Respondents later filed an amended complaint, again alleging a private right of enforcement of the NHA, the Regulations promulgated thereunder and the federal mortgage insurance agreements, as well as state statutory causes of action. Petitioners again demurred and filed a motion to strike, and the trial court again ruled in favor of Petitioners by partially sustaining the demurrer and

by striking all references in Respondents' complaint to the National Housing Act and Regulations promulgated thereunder, as well as all references to the federally insured mortgage and the Regulatory Agreement.

On or about July 15, 1980, Respondents filed their petition for writ of mandate in the Court of Appeals, based on the theory that state law permitted third party beneficiary claims under the Regulatory Agreement. This issue was claimed to be one of first impression in California, as shown by Paragraph 18 of Respondents' "Petition for Writ of Mandate and/or Certiorari" (sic):

> "18. The right of tenants of a HUD-insured residential project to sue the landlord under state law principles for charging them excessive rents and overcharges in violation of the landlord's agreements with them, which agreements arose under the National Housing Act intended to provide housing for families of moderate income, is a question of public importance. It is a matter of first impression in this state, and there is significant need and opportunity for general guidelines to be affirmed by this court regarding tenants' ability to recover admittedly unlawful and excessive rental charges."

Petitioners' brief in opposition to the petition for writ of mandate presented the extensive federal legal precedent which prohibits a private right of enforcement of the standard printed form HUD Regulatory Agreement. Petitioners further asserted that federal law preempts the application of state law on this issue, as both the Federal Courts of Appeal and the California Supreme Court had previously held.

> "The *Johnson* Court also held that 'federal law is paramount and that California law does not apply.' (Petitioners' memorandum of points and authorities in opposition to petition for writ of mandate, p. 7:18, citing *Johnson v. Redevelopment Agency of the City of Oakland* 317 F.2d 872 (1963, 9th Cir.).)
>
> The California Supreme Court held in *Martinez* that federal law must apply in instances involving federal contracts . . ." (Petitioners' memorandum of points and authorities in opposition to petition for writ of mandate, p. 19:8-18, citing *Martinez v. Socoma Companies, Inc.*, (1974) 11 Cal.3d 394, 113 Cal.Rptr. 585.)

Again, in Petitioners' written return to the alternative writ of mandate (equivalent to a supplemental brief on the merits after a hearing is granted), the preemption question was raised as follows:

> ". . . the California Supreme Court's decision in *Martinez* is dispositive of the issues presently before this court. Therein not only was the primacy and application of federal law regarding the legal interpretation of federal contracts affirmed, but the Supreme Court reaffirmed the applicability of § 145 of the Restatement of Contracts, as part of the law of the State of California." (Petitioners' written return to alternative writ of mandate, p. 9:13-20, referring to *Martinez v. Socoma Companies, Inc., supra.*)

In direct contravention of then existing federal and California legal precedent, the Court of Appeals ruled that even though no cause of action to enforce the provisions of the Regulatory Agreement was stated under federal law, Respondents had stated such a cause of action under California law. This was based on a third party beneficiary status

under the HUD Regulatory Agreement pursuant to some amorphous state law principles. The opinion of the Court of Appeals is contained in the appendix hereto.

Petitioners duly filed a petition for rehearing which contained extensive argument on the preemption question. The introductory summary and conclusion from Petitioners' petition for rehearing is also contained in the appendix hereto.

After rehearing was denied on July 24, 1981, Petitioners filed a timely petition for hearing before the Supreme Court of California, again raising the issue of federal preemption of state law. Hearing was denied on September 10, 1981.

Petitioners removed this case to the United States District Court for the Northern District of California on October 8, 1981. The docket number therein is C-81-4045-RPA. As of the date of this petition, Respondents' motion to remand the action to state court and Petitioners' motion to dismiss the claims under the HUD Regulatory Agreement pursuant to Rule 12, FRCP, are under submission. The motions were heard on December 3, 1981. This petition is submitted at this time to comply with 28 U.S.C. § 2101(c) to preserve Petitioners' standing to invoke the jurisdiction of this Court on the question of federal preemption of state law within 90 days from the date the Supreme Court of California denied Petitioners' petition for hearing.

REASONS FOR GRANTING THE WRIT

1. Introduction

California has decided that it may apply its own law in creating private rights of action under a standard printed

form HUD Regulatory Agreement used to implement and administer the national program of housing mortgage insurance under 12 U.S.C. § 1701 *et seq.*, specifically 12 U.S.C. § 1713. This is in direct conflict with the overwhelming weight of authority from the Federal Courts of Appeal which have consistently held that federal law, and only federal law, may be applied to National Housing Act mortgage agreements. The California decision also conflicts in principle with the standards set by this Court in *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979), in that it creates a private right of action not supported by the clear language of the National Housing Act.

The California decision, if allowed to stand has far-reaching implications. If states may apply their own laws to interpret standard printed form HUD housing mortgage insurance agreements to which HUD is a primary contracting party, HUD has in effect been subjected to state control. The next logical step is that dissatisfied tenants will sue HUD directly whenever the Secretary's acts (committed to his discretion by Congressional mandate) do not please them. If the tenants are "beneficiaries" of a mortgagor's promises, then they would be "beneficiaries" of HUD's promises as well. The important federal interest of maintaining administrative discretion and of applying a uniform body of federal law to HUD's ministerial acts have been seriously impaired. Furthermore, since Respondents herein are asserting their claims to private rights under the Regulatory Agreement *after* repayment of the mortgage in question, there is great potential for subjecting the Secretary to involvement in litigation long after his interest in an insured mortgage has expired.

This Court has never settled the question whether a state may create a cause of action in favor of alleged third party beneficiaries of standard printed form federal housing mortgage insurance agreements when the Federal Courts of Appeal have clearly stated that no such cause of action exists under federal law. California has made its statement on the matter, and the issue is not subject to further determination in the instant matter outside of a review by this Court.

2. Conflicts with Federal Appellate Courts

The Federal Courts of Appeal for the First, Second, Sixth, Seventh and Ninth Circuits, together with the Court of Claims, have specifically held that federal law, and only federal law, is to apply to cases arising under the National Housing Act, 12 U.S.C. § 1701 *et seq.* As stated by the Court of Appeal for the Ninth Circuit in *United States v. View Crest Garden Apartments, Inc.*, (1959) 268 F.2d 380, 382,

> " . . . if the law of the [State] is to have any application in the foreclosure proceeding it is not because it applies of its own force, but because either the Congress, the FHA, or the Federal Court adopts the local rule to further federal policy."

See also *United States v. Scholnick,* (6th Cir. 1979), 606 F.2d 160, and *United States v. Helz*, (6th Cir. 1963), 314 F.2d 301. The National Housing Act is a program which must be uniform in character throughout the nation, and therefore, not subject to the vagaries of state law. *Oglethorpe Co. v. United States*, (Ct.Cl. 1977), 558 F.2d 590, 595.

These holdings are consistent with the broader principle that federal law applies to contracts entered into under the auspices of federal statutes. See, for example, *Local 174, Teamsters, Chauffeurs, Warehousemen & Helpers of America v. Lucas Flour Co.*, 369 U.S. 95 (1962), and *Johnson v. Redevelopment Agency of the City of Oakland, California,* (9th Cir. 1963), 317 F.2d 872.

The *Johnson* case also involved an attempt by California to append state law third-party beneficiary rights to a federally insured mortgage agreement (under the Housing Act of 1949, 45 U.S.C. § 1455(c)). The court stated at 317 F.2d 874: ". . . the contract, involving an agency of the United States and controlled by federal statutes, is governed by federal law. The federal courts have consistently held that those not parties to the contract have no standing to enforce conditions imposed on redevelopment agencies by the United States, although those suing would benefit from such enforcement."

The present California appellate court relied heavily on the opinion in *Miree v. DeKalb County, Georgia*, 433 U.S. 25 (1977), in which this Court held that Georgia law could apply to extend rights to third-party beneficiaries under contracts between the Federal Aviation Administration and the local governmental body. In that case the United States waived its right to respond, having determined that the outcome of the case would not affect any significant governmental interest.

The instant case, however, arises in the context of a Congressional mandate, as interpreted by the Federal Courts of Appeal, that an act or failure to act, by the Secretary of Housing and Urban Development in administering the National Housing Act, 12 U.S.C. § 1701, *et seq.*, is within that very narrow class of agency action which is immune from judicial review. See, for example, *Falzarano v. United States,* (1st Cir., 1979), 607 F.2d 506, involving identical third-party beneficiary claims to the same Regulatory Agreement at issue here, and holding that no such claims existed. (*See also Harlib v. Lynn,* (7th Cir., 1975), 511 F.2d 51, *Langevin v. Chenango Court, Inc.,* (2d Cir., 1971), 447 F.2d 296, and *Hahn v. Gottleib,* (1st Cir., 1979), 430 F.2d 1243.

Finally, the opinion of the California appellate court directly conflicts with the First Circuit Court of Appeals' decision in *Falzarano v. United States, supra,* and cases cited therein. *Falzarano* held that no private rights of action were created by the National Housing Act. In reaching that decision, the Court of Appeals conducted a thorough analysis of the Act according to the principles enunciated in *Touche Ross & Co. v. Redington,* 442 U.S. 560 (1979), and concluded, "Permitting tenants to bring suit when they differ with the Secretary's determinations as to the adequacy of rents and charges would not, we think, harmonize with the Act's intent . . . The overall statutory scheme suggests that no private right of action exists." 607 F.2d at 510.

3. The Importance of the Issues

In many of the cases cited above, dissatisfied tenants attempted to sue HUD directly, as well as the private mortgagors, for the Secretary's failure to enforce federally insured housing mortgage agreements to their satisfaction. To allow a third-party beneficiary action under state law principles solely against the mortgagor would open the backdoor to suits directly against the Secretary.

The federal interest in maintaining the discretion of the Secretary of HUD without interference from state courts which are applying state law is paramount. The Supremacy Clause of the United States Constitution, Article VI, paragraph 2, is the stricture against state interference with federal agency functions such as this.

The great weight of federal law holds that a state is not free to apply its own laws in a case such as this; yet California has asserted its freedom to do so. In effect California has stated it need not be bound by Congressional mandates of agency discretion found in 5 U.S.C. § 551 (13):

> "For the purpose of this subchapter—
>
> "(13) 'agency action' includes the whole or a part of an agency, rule, order, license, sanction, relief, or the equivalent or denial thereof, or *failure to act . . .*" [Emphasis supplied.]

The idea that California may apply its own law even though federal law extends full ministerial discretion to the Secretary of HUD by making even his *ex parte* actions non-reviewable is preposterous. *Langevin v. Chenango Court, Inc.*, (1971, 2d Cir.) 447 F.2d 296. In fact, *ex parte* communications are contemplated by the language of 5 U.S.C. § 551 (14).

The interest in protecting the federal fisc has been called "overriding" when determining whether state or federal law should apply in determining the remedies available on default under a federally insured housing mortgage. *United States v. Scholnick,* (6th Cir. 1979), 606 F.2d 160, 164. According to the Regulatory Agreement itself, the NHA and the Regulations promulgated thereunder, the Secretary of HUD is solely invested with the power to declare a default *and* with the power to decide when the default has been corrected to the Secretary's satisfaction. Thus California has decided, in effect, that the tenants of a federally insured housing project in California may supplant the Secretary and exercise the Secretary's full discretion under the Regulatory Agreement and the NHA. Such a result is wholly without legal foundation.

4. Timeliness of the Petition

The Supreme Court of California, by refusing a hearing on this matter, has finally adjudicated the issue of whether under California state law principles Respondents have stated a cause of action. The removal of this action to federal court does not alter the state court's determination of what California law is. No further state court proceedings are possible on the state law issue.

Failure to hear this petition at this time will result in confusion among state and federal courts as inevitable future litigants assert their own state law claims. Even if Petitioners were to be successful at trial, thus mooting the issue for the parties hereto, the startling California deci-

sion will have repercussions throughout California and probably throughout the nation.

In determining whether a judgment is final for purposes of review, this Court has declared that review may be had, even though further proceedings remain, in four categories of cases. The first category is when the determination of the federal issue is conclusive to the outcome of the case. The second is when nothing remains to be decided in the case which could conceivably make determination of the federal question unnecessary. The third category contains those cases in which the federal issue will be mooted or rendered nonreviewable after conclusion of the matter. Lastly, there are those cases where reversal on the federal issue would preclude further litigation on the relevant cause of action and a delay in review might seriously erode federal policy. These factors have been outlined in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975).

Within the last category are found cases in which a state court has declared its right to proceed in the face of federal preemption. The preemption issue was deemed separable from the merits and ripe for review in *Construction Laborers v. Curry*, 371 U.S. 542 (1963), because of the important questions of national labor policy involved in the case.

Petitioners respectfully submit the federal issues herein are sufficiently important to bring this case within the last category outlined above. Reversal on the federal issues would largely conclude the case below, limiting further litigation to state statutory causes of action and preclud-

ing claims based on the NHA, the Regulations promulgated thereunder and the standard printed form HUD Regulatory Agreement. Respondents have suggested in their pending motion to remand the action to the state court that review by this Court would be appropriate at this stage of the proceedings. Petitioners therefore respectfully request that their Petition be heard and granted at this time.

CONCLUSION

For the foregoing reasons, the Petition for Writ of Certiorari should be granted.

Dated: December 9, 1981

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APPENDIX A

IN THE COURT OF
APPEAL OF THE
STATE OF CALIFORNIA

Irma ZIGAS, Arthur L. Zigas, Constance C. Porter, Dan F. Porter, and Lee Glanzman, on behalf of themselves and all others similarly situated, Petitioners,

v.

SUPERIOR COURT OF the STATE OF CALIFORNIA IN AND FOR the CITY AND COUNTY OF SAN FRANCISCO, Respondent,

Angelo SANGIACOMO; Two Thousand Broadway, a limited partnership; Trinity Properties, Inc., a corporation; Trinity Management Services, a corporation, Real Parties in Interest.

Civ. 50140.

Court of Appeal, First District,
Division Three.

June 24, 1981

120 C.A. 3d 827
174 Cal. Rptr. 806

FEINBERG, Associate Justice.

This case is before us on a petition for writ of mandate. Because the issues involved appeared to be of considerable

public importance and of first impression, we issued an alternative writ. We now hold that the relief sought should be granted.

Petitioners are tenants of an apartment building at 2000 Broadway in San Francisco, which was financed with a federally insured mortgage in excess of $5 million, pursuant to the National Housing Act (12 U.S.C. §1701 et seq.) (the Act) and the regulations promulgated thereunder (24 C.F.R. §207 et seq.). They seek in a class action, inter alia, damages for the landlords' (real parties in interest) violation of a provision of the financing agreement which requires that the landlords charge no more than the Department of Housing and Urban Development (HUD) approved schedule of rents. The trial court has sustained demurrers without leave to amend to 5

causes of action of 15 alleged, apparently on the ground that there is no right in the tenants to enforce the provisions of an agreement between their landlords and the federal government.

Petitioners allege that their landlords were required under their contract with HUD to file a maximum rental schedule with HUD and to refrain from charging more than those rents without the prior approval of the Secretary of HUD. Petitioners further allege that real parties are, and have been, charging rent in excess of the maximums set out in the rental schedule; the complaint avers that real parties have collected excessive rents and fees in an amount exceeding $2 million.

In addition to sustaining demurrers as to the third-party causes of action, the trial court granted real parties' motion to strike all references to the

Act, the regulations promulgated thereunder, and the terms of the agreement between HUD and real parties. It is these orders sustaining the demurrers and granting the motion to strike that petitioners seek to have set aside.

The issues presented include: (1) whether federal or state law applies; (2) whether petitioners have standing to sue, and (3) whether the action has become moot as a result of real parties' repayment of the HUD insured loan.

Federal or State Law

Real parties appear to argue at one point that whether petitioners have standing to sue is to be determined by federal law because a federal contract arising under a federal statute is involved. In so arguing, real parties misconceive the nature of the complaint in the case at bar. The complaint does

not allege a federal cause of action, i.e., arising out of the National Housing Act. What it alleges, in substance, is that pursuant to the Act, an agreement was entered into between HUD and real parties whereby real parties promised not to charge as rent more than that approved by HUD. Real parties did so charge and petitioners, under California law, seek redress as the parties aggrieved.

Thus, Touche Ross & Co. v. Redington (1979) 442 U.S. 560, 99 S.Ct. 2479, 61 L.Ed.2d 82, for example, relied upon by real parties, is inapposite. In Touche Ross, customers of security brokerage houses brought a federal action for damages against accountants who audited certain financial reports the security brokerage firms were required to file under section 17(a) of the Securities and Exchange Act of 1934, based on misstatements contained in the reports.

Jurisdiction of the federal court was invoked under section 17(a).

The court held Congress did not create a federal statutory cause of action under section 17(a) in the customers of the brokerage houses for a violation of the section.[1]

In the case at bench, as we have said, petitioners do not contend that the National Housing Act created a federal statutory cause of action in the tenants.

In Cort et al. v. Ash (1975) 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26, a stockholder of a corporation brought an action for damages against the corporate directors on the ground that the corporation had made illegal contributions or

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[1] Parenthetically, the court observed that a state action had been brought by the same plaintiffs against the same defendant wherein the allegations of the complaint were substantially identical with those before the Supreme Court except that plaintiffs made no claim under section 17(a). (Ibid.)

expenditures in connection with a federal election in violation of 18 United States Code section 610.

The court held that no private cause of action was created by section 610 cognizable in federal court. However, the court did recognize that violation of section 610 could create the framework for a cause of action under state law. In this context, the court said, "[I]t is entirely appropriate ... to relegate respondent [the stockholder-plaintiff] and others in his situation to whatever remedy is created by state law. In addition to the ultra vires action pressed here, ... the use of corporate funds in violation of federal law may, under the law of some States, give rise to a cause of action for breach of fiduciary duty." (Id., 422 U.S. at p. 84, 95 S.Ct. at p. 2091).

We now advert to Miree v. DeKalb County (1977) 433 U.S. 25, 97 S.Ct. 2490, 53 L.Ed.2d 557, a case more directly in point here.

In Miree, victims of an airplane crash sued DeKalb County, Georgia in federal court under a third-party-beneficiary theory. One of the terms of a contract between the county and the Federal Aviation Administration (FAA) provided that the county agreed to restrict land use in the vicinity of the airport to "'activities and purposes compatible with normal airport operations including landing and takeoff of aircraft.'" (Id., at p. 27, 97 S.Ct. at p. 2492.) The lawsuit alleged that the county had breached the contract by maintaining a garbage dump adjacent to the airport and that the cause of the crash was the ingestion of birds swarming from the dump into the aircraft's jet

engines. Federal jurisdiction was invoked under 28 United States Code section 1332, diversity of citizenship, only.

The Miree court determined that the controversy should have been decided under state law, and explained its ruling in the following terms: "The litigation before us raises no question regarding the liability of the United States or the responsibilities of the United States under the contracts. The relevant inquiry is a narrow one: whether petitioners as third-party beneficiaries of the contracts have standing to sue respondent. While federal common law may govern even in diversity cases where a uniform national rule is necessary to further the interests of the Federal Government, Clearfield Trust Co. v. United States, 318 U.S. 363, 63 S.Ct. 573, 87 L.Ed. 838 (1943), the application

of federal common law to resolve the issue presented here would promote no federal interests even approaching the magnitude of those found in Clearfield Trust: ... " (Miree v. DeKalb County, supra, 433 U.S. at pp. 28-29, 97 S.Ct. at 2493, fn. omitted, emphasis added.)

The court also observed: "The operations of the United States in connection with FAA grants such as these are undoubtedly of considerable magnitude. However, we see no reason for concluding that these operations would be burdened or subjected to uncertainty by variant state-law interpretations regarding whether those with whom the United States contracts might be sued by third-party beneficiaries to the contracts. Since only the rights of private litigants are at issue here, we find the Clearfield Trust rationale inapplicable." (Id. at p. 30, 97 S.Ct. at p. 2494.)

Finally, the court noted that the federal interest was implicated "only insofar as such lawsuit might be thought to advance federal aviation policy by inducing compliance with FAA safety provisions." (Id., at p. 32, 97 S.Ct. at p. 2495.)

The parallel between Miree and this case compel the application of state law in all questions involving third-party beneficiary rights under the contract. The lawsuit is between private litigants, and raises no question regarding liability of the United States. Though the operations of HUD are of considerable magnitude, there is no reason to conclude that the operations of the department would be unduly burdened or subjected to uncertainity by variant state law interpretations. In fact, the primary effect which this case could have on federal housing policy would be to

promote compliance with HUD requirements regarding HUD approved rent schedules.

Finally, in this aspect, real parties rely upon Martinez v. Socoma Companies, Inc. (1974) 11 Cal. 3d 394, 113 Cal. Rptr. 585, 521 P.2d 841. That reliance is misplaced. Martinez does not hold as sweepingly as real parties assert "that the public beneficiaries of a federally funded program have no rights as third-party beneficiaries such as to enable them to sue for nonperformance theeof."

What Martinez held is that the determination of whether beneficiaries under a contract between a federal agency and a private party have standing to sue a private party for nonperformance of the agreement as third party beneficiaries "must be made in light of applicable federal statutes and other matters we [the court] must judicially notice."

(Id., at p. 400, 113 Cal. Rptr. 585, 521 P.2d 841.)

At this juncture, we conclude as follows: Granted that the National Housing Act does not create a federal statutory right of action in petitioners, nevertheless, they may have standing to sue based on a cause of action under applicable state law.

We turn now to the question of whether petitioners have a cause of action under California law.

Standing to Sue - Third Party Beneficiary

California law clearly allows third-party suite for breaches of contract where no government agency is a party to the contract. (Civ.Code, §1559.) Whether such suits are allowed when the government contracts with a private party depends upon analysis of the decisions in Shell v. Schmidt (1954)

126 Cal. App.2d 279, 272 P.2d 82, and Martinez v. Socoma Companies, Inc., supra, 11 Cal. 3d 394, 113 Cal. Rptr. 585, 521 P.2d 841.

In Shell, plaintiffs sued as third-party beneficiaries to defendant's contract with the Federal Housing Authority (FHA). The contract entailed an agreement by the defendant to build homes for sale to veterans according to plans and specifications submitted by the defendant to FHA in return for which FHA gave priorities to the defendant to secure the materials necessary for the building.

In deciding that plaintiffs had standing to enforce the terms of the contract between the defendant and the FHA, the Shell court relied on common law principles as embodied in Civil Code section 1559, which states: "A contract, made expressly for the benefit of a third

person, may be enforced by him at any time before the parties thereto rescind it." Applying this provision to the facts before it, the Shell court observed: "Once it is established that the relationship between the contractor and the government is contractual, it follows that verterans purchasing homes, that is, the class intended to be protected by that contract, are third party beneficiaries of that contract. As already pointed out, the statute and the regulations passed thereunder resulting in the contract were passed to aid and assist veterans and for their benefit. Purchasing veterans constitute the class intended to be benefitted, and the contract must therefore be for their benefit. (Id., 126 Cal. App.2d at p. 290, 272 P.2d 82.)

It is evident that petitioners are entitled to maintain a third-party cause

of action under the Shell rationale. Real parties do not dispute the contractual nature of their relationship with HUD. And it is clear that a requirement of HUD approval of rent increases could only benefit the tenants.

Furthermore, even the most cursory review of the statutes and regulations which resulted in the contract in the present case leads to the conclusion that the tenants constitute the class which Congress intended to benefit. As stated in 12 United States Code section 1701t: "The Congress affirms the national goal, as set forth in section 1441 of Title 42, of 'a decent home under a suitable living environment for every American family.'" (Section 1713(b) of Title 12, United States Code, also provides, in part: "The insurance of mortgages under this section is intended to facilitate particularly the production of rental accommodations,

at reasonable rents, ... The Secretary is, therefore, authorized ... to take action, by regulation or otherwise, which will direct the benefits of mortgage insurance hereunder primarily to those projects which make adequate provision for families with children, and in which every effort has been made to achieve moderate rental charges. (Emphasis added, see also 24 C.F.R. §207.19(e).)

This national goal, along with the purposes enunciated throughout the Act and the regulations promulgated thereunder, can leave no doubt that petitioners are members of the class which this legislation was intended to benefit. Under Shell, this conclusion, coupled with the uncontested contractual relationship between real parties and HUD, is sufficient to support the tenants' standing to sue as third-party beneficiaries to a government contract.

In the subsequent case of Martinez v. Socoma Companies, Inc., supra, 11 Cal. 3d 394, 113 Cal. Rptr. 585, 521 P.2d 841, the court approved of the result in Shell but, at the same time, applied a different standard.[2] Plaintiffs in Martinez sought to reinforce the terms of a contract between Socoma Companies, Inc. and the Secretary of Labor. Under this agreement, defendants recived government funds in exchange for a promise to hire and train "hard core unemployed" residents of a "Special Impact Area" in East

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[2] The Martinez court approved of the result in Shell, based upon a finding that the legislation under which the homes in Shell were built included a provision empowering the government to obtain payment by the contractor to the veteran purchasers for deficiencies resulting from failure to comply with specifications (Martinez, supra, at p. 403, 113 Cal. Rptr. 585, 521 P.2d 841.) Thus, the intent to compensate which Restatement, Contracts, section 145 requires was present. However, the Shell court made no mention of section 145.

Los Angeles. Defendants failed to perform, and plaintiffs, who were residents of East Los Angeles and members of the class which the government intended to benefit, sought to recover under the contract.

In holding that the plaintiffs had no standing to sue as third-party beneficiaries, the Martinez court adopted a more restrictive standard than that embodied in Civil Code section 1559, choosing instead to be guided by the principles set forth in section 145 of the Restatement of Contracts: "'A promisor bound to the United States or to a State or municipality by contract to do an act or render a service to some or all of the members of the public, is subject to no duty under the contract to such members to give compensation for the injurious consequences of performing or attempting to perform it, or of failing

to do so, unless, ... an intention is manifested in the contract, as interpreted in the light of the circumstances surrounding its formation, that the promisor shall compensate members of the public for such injurious consequences ...'" (Martinez v. Socoma Companies, Inc., supra, at pp. 401-402, 113 Cal. Rptr. 585, 521 P.2d 841; City & County of San Francisco v. Western Air lines, Inc. (1962) 204 Cal. App.2d 105, 121, 22 Cal. Rptr. 216: Rest., Contracts, supra, §145.)[3]

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[3] It has been suggested that section 145 was meant only to preclude lawsuits for consequential damages arising out of government contracts, because the resulting potential liability may be disproportionately burdensome in relation to the value of the promised performance. (See Rest., Contracts, supra, §145, illus. 1 and 2; 44 A.L.I. Proceedings 331 (1967). Thus, the underlying rationale of section 145 is inapplicable where, as here, the money sought is not a consequence of the breach, it is the breach. In such a situation, standard third-party beneficiary doctrines should apply. (See Note 88 Harv.L.Rev. 646, 650-651.)

Thus, under Martinez, standing to sue as a third-party beneficiary to a government contract depends on the intent of the parties as manifested by the contract and the circumstances surrounding its formation. "Insofar as intent to benefit a third person is important in determining his right to bring an action under a contract, it is sufficient that the promisor must have understood that the promisee had such intent. [Citations.] No specific manifestation by the promisor of an intent to benefit the third person is required." (Lucas v. Hamm (1961) 56 Cal. 2d 583, 591, 15 Cal. Rptr. 821, 364 P.2d 685.) We therefore must determine, from the terms of the contract between HUD and real parties and the attendant circumstances, whether there was manifested an intention that petitioners be compensated in the event of real parties' nonperformance. Mindful

of the rule that "[w]hen a complaint is based on a written contract which it sets out in full, a general demurrer to the complaint admits not only the contents of the instrument but also any pleaded meaning to which the instrument is reasonably susceptible. [Citation.]" (Martinez v. Socoma Corporations, Inc., supra, 11 Cal. 3d at p. 400, 113 Cal. Rptr. 585, 521 P.2d 841) and focusing upon the precepts of Martinez as to standing, we are of the view that the case falls within Shell; that is to say, appellants were direct beneficiaries of the contract and have standing, and not, as in Martinez, incidental beneficiaries without standing.

We explicate:

1. In Martinez, the contract between the government and Socoma provided that if Socoma breached the agreement,

Socoma would refund to the government that which the government had paid Socoma pursuant to the contract between them. Thus, it is clear in Martinez that it was the government that was out of pocket as a consequence of the breach and should be reimbursed therefor, not the people to be trained and given jobs. In the case at bench, as in Shell, the government suffered no loss as a consequence of the breach, it was the renter here and the veteran purchaser in Shell that suffered the direct pecuniary loss.

2. Unlike Martinez, too, in the case at bench, no governmental administrative procedure was provided for the resolution of disputes arising under the agreement. Thus, to permit this litigation would in no way affect the "efficiency and uniformity of interpretation fostered by these administrative procedures." (Martinez v. Socoma Companies,

Inc., supra, 11 Cal. 3d at p. 402, 113 Cal. Rptr. 585, 521 P.2d 841.) On the contrary, as we earlier noted, lawsuits such as this promote the federal interest by inducing compliance with HUD agreements.

3. In Martinez, the court held that "To allow plaintiffs' claim would nullify the limited liability for which defendants bargained and which the Government may well have held out as an inducement in negotiating the contracts." (At p. 403, 113 Cal. Rptr. 585, 521 P.2d 841, fn. omitted.) Here, there is no "limited liability." As we shall point out, real parties are liable under the agreement, without limitation, for breach of the agreement.

4. Further, in Martinez, the contracts "were designed not to benefit individuals as such but to utilize the training the employment of disadvantaged

persons as a means of improving the East Los Angeles neighborhood." (At p. 406, 113 Cal. Rptr. 585, 521 P.2d 841.) Moreover, the training and employment programs were but one aspect of a "broad, long-range objective" (id.) contemplated by the agreement and designed to benefit not only those to be trained and employed but also "other local enterprises and the government itself through reduction of law enforcement and welfare costs." (Id.)

Here, on the other hand, as in Shell, the purpose of the Legislature and of the contract between real parties and HUD is narrow and specific: to provide moderate rental housing for families with children; in Shell, to provide moderate priced homes for veterans.

5. Finally, we believe the agreement itself manifests an intent to make

tenants direct beneficiaries, not incidental beneficiaries, of real parties' promise to charge no more than the HUD approved rent schedule.

Section 4(a) and 4(c) of the agreement, providing that there can be no increase in rental fees, over the approved rent schedule, without the prior approval in writing of HUD, were obviously designed to protect the tenant against arbitrary increases in rents, precisely that which is alleged to have occurred here. Certainly, it was not intended to benefit the Government as a guarantor of the mortgage.

Furthermore, the provision in section 11(d) of the agreement, authorizing the Secretary of HUD to "[a]pply to any court ... for specific performance ..., for an injunction against any violation ... or for such other relief as may be appropriate" (emphasis added)

would entitle the secretary to seek restitution on behalf of the tenants overcharged, for such relief would surely be "appropriate". (See Porter v. Warner Co. (1946) 328 U.S. 395, 66 S.Ct. 1086, 90 L.Ed. 1332.) Thus, there was an intent upon the part of the government in executing the agreement with real parties, to secure the return of any rents exacted in excess of the rent schedule.

We are supported in our view by section 17 of the Agreement which specifically provides that real parties are personally liable, "(a) for funds ... of the project coming into their hands which, by the provisions [of the Agreement] they are not entitled to retain; and (b) for their own acts and deeds or acts and deeds of other [sic] which they have authorized in violation of

the provisions [of the Agreement]." (Emphasis added.)

By the allegations of the complaint, real parties have "retained" in excess of two million ($2,000,000) dollars in violation of the Agreement. Therefore, they are liable for that sum. To whom should they be liable? To ask the question is to answer it. It is not the government from whom the money was exacted; it was taken from the tenants. Therefore, it should be returned to the tenants.

In the face of this evidence of intent to direct the benefits of mortgage insurance to the tenants of the facilities involved, real parties argue that petitioners have no standing to sue because enforcement of the agreement is vested solely in the Secretary. They point to 12 United States Code section 1731, which empowers the Secretary to

refuse the benefits of participation to any mortgagor who violates the terms of the agreement. However, section 1731's authorization does not constitute the exclusive remedy for enforcement of the agreement by the Secretary or by third parties. As stated by the court in Shell v. Schmidt, supra, 126 Cal. App.2d at p. 287, 272 P.2d 82: "This fundamental purpose would, in many cases, be defeated if the statute were interpreted so as to deprive the veterans of their normal remedies to the benefit of defaulting contractors -- the very class it was the purpose of the statute to protect the veterans against. It must be held, therefore, that the enumeration of remedies in the statute merely created new enumerated remedies and was not intended to and did not deprive the veterans of any action for fraud or

breach of contract that they might have under general contract principles."

Similarly, it would be anomalous if a congressional program, and the regulatory agreement formed thereunder, all of which was designed to assist in providing housing for low and moderate income families, were construed so as to provide cheap financing for the housing industry while at the same time denying tenants any means of protecting the benefits which they were intended to receive.

Real parties direct this court's attention to Falzarano v. United States (1st Cir. 1979) 607 F.2d 506, in which the court denied relief to tenants of a similar project. However, Falzarano and other similar cases cited by real parties, involved situations where tenants were contesting HUD-approved rent increases. (See Fenner v. Bruce Manor,

Inc. (D.Md.1976) 409 F.Supp. 1332; Harlib v. Lynn (7th Cir. 1975) 511 F.2d 51; Feldman v. HUD (E.D.Pa.1977) 430 F.Supp. 1324.) These cases are therefore inapposite; a requirement of tenant approval to a rent increase or a tenant suit to challenge a HUD-approved increase could easily frustrate the Secretary's policy of maintaining a reasonable return of mortgagor's investments and promoting the financial stability of the housing projects. In contrast, as we have noted, maintenance of petitioners' action in this case will only serve to effectuate the policies of the Act.

Thus, for reasons we have set forth, appellants are entitled to maintain a third-party beneficiary action against real parties.

Standing to Sue--Restitution

We can do no better than to quote the Supreme Court of New Jersey in a case substantially on all fours with the case at bench. "Accepting as we must for present purposes, the plaintiffs' version of the transaction there was an illegal and unjust exaction of rent in excess of the maximum expressly prescribed by the Administrator's [presently the Secretary of HUD] regulations and in violation of the terms embodied therein .... This exaction resulted in the unjust enrichment of the defendants at the plaintiffs' expense and, special defenses aside, entitles the plaintiffs to restitution under settled equitable principles cognizable in the lower court." (Brinkmann v. Urban Realty Co., Inc. (1952) 10 N.J. 113, 119, 89 A.2d 394.)

Conclusion

Surely it would be unconscionable if a builder could secure the benefits of a government guaranteed loan upon his promise to charge no more than a schedule of rents he had agred to and then find there is no remedy by which the builder can be forced to disgorge rents he had collected in excess of his agreement simply because the Government had failed to act.

Insofar as appellants sought specific performance of the contract between real parties and HUD or an injunction against breach of that contract by real parties, it appears that such relief has become moot because the contract has expired. Thus, we have not addressed the question as to whether the appellants have standing to seek such remedies.

Let a writ of mandate issue directing the trial court to set aside its

orders sustaining the general demurrers and granting the motion to strike. The matter is remanded for such further proceedings as may be appropriate and not inconsistent with the views expressed herein.

WHITE, P. J., and SCOTT, J., concur.

APPENDIX B

COURT OF APPEAL

OF THE STATE OF CALIFORNIA

IN AND FOR THE

FIRST APPELLATE DISTRICT

DIVISION THREE

Irma Zigas, et al., Petitioners, vs. Superior Court of the State of California in and for the City and County of San Francisco, Respondent.	No. 1 CIV 50140 Superior Court No. _____

Angelo Sangiacomo et al.,

Real Parties in Interest.

BY THE COURT:

The petition for rehearing is denied.

Dated July 24, 1981

_____P.J.

APPENDIX C

CLERK'S OFFICE, SUPREME COURT
4250 State Building

San Francisco, California 94102

SEP 10 1981

I have this day filed Order

HEARING DENIED

In re: 1 CIV. No. 50140

Zigas et al

vs.

Sup. Ct. S F

Respectfully,

. Clerk

APPENDIX D

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

Department 9

IRMA ZIGAS, et al.,	IN OPEN COURT
Plaintiff.	October 25,1979
	Superior Court
vs.	No. 754-035
ANGELO SANGIACOMO, et al.,	
Defendant.	

Defendants' demurrer for failure to state facts sufficient to constitute a cause of action is sustained without leave to amend as to the first and second causes of action, sustained with leave to amend as to the third, fourth and eighth causes of action, 20 days to amend, and overruled as to the fifth, sixth, seventh, ninth, tenth, eleventh, twelfth and thirteenth causes of action, 30 days to answer.

Defendants' demurrer on grounds that there is another action pending between the same parties on the same cause of action is overruled.

/S/ Ira A. Brown, Jr .
IRA A. BROWN, JR.
JUDGE OF THE SUPERIOR COURT

MINUTE ORDER

APPENDIX E

SUPERIOR COURT OF THE STATE OF CALIFORNIA
FOR THE CITY AND COUNTY OF SAN FRANCISCO

Department 9

IRMA ZIGAS, et al.,	IN OPEN COURT
Plaintiff.	May 13, 1980
vs.	No. 754-035
ANGELO SANGIACOMO, et al.,	
Defendant.	

Defendants' demurrer to the first amended complaint for failure to state facts sufficient to constitute a cause of action is sustained without leave to amend as to the first, second, sixth, thirteenth, fourteenth and fifteenth causes of action, and overruled as to all other causes of action, 30 days to answer.

Defendants' motion to strike is granted as to items 12, 13, 14, 15, 16, 17, 18, 19, 22, 23, 25, 26, 28, 30, 33, 34, 36, 38, 50, 51, 52, 53, and denied as to all other items.

/S/ Ira A. Brown, Jr .
IRA A. BROWN, JR.
JUDGE OF THE SUPERIOR COURT

MINUTE ORDER

APPENDIX F

5 U.S.C. Section 551.

For the purpose of this subchapter--

* * *

(13) "agency action" includes the whole or a part of an agency rule, order, license, sanction, relief, or the equivalent or denial thereof, or failure to act; and

(14) "ex parte communication" means an oral or written communication not on the public record with respect to which reasonable prior notice to all parties is not given, but it shall not incude requests for status reports on any matter or proceeding covered by this subchapter.

APPENDIX G

5 U.S.C. Section 701.

(a) This chapter applies, according to the provisions thereof, except to the extent that--

* * *

(2) agency action is committed to agency discretion by law.

APPENDIX H

12 U.S.C. Section 1713

Definitions

(a) As used in this section--

(1) The term "mortgage" means a first mortgage on real estate in fee simple, or on the interest of either the lessor or lessee thereof (A) under a lease for not less than ninety-nine years which is renewable or (B) under a lease having a period of not less than fifty years to run from the date the mortgage was executed, upon which there is located or upon which there is to be constructed a building or buildings designed principally for residential use, or upon which there is located or to be constructed facilities for manufactured homes, and the term "first mortgage" means such classes

of first liens as are commonly given to secure advances (including but not being limited to advances during construction) on, or the unpaid purchase price of, real estate under the laws of the State, in which the real estate is located, together with the credit instrument or instruments, if any, secured thereby, and may be in the form of trust mortgages or mortgage indentures or deeds of trust securing notes, bonds, or other credit instruments.

(2) The term "mortgagee" means the original lender under a mortgage, and its successors and assigns, and includes the holders of credit instruments issued under a trust mortgage or deed of trust pursuant to which such holders act by and through a trustee therein named.

(3) The term "mortgagor" means the original borrower under a mortgage and its successors and assigns.

(4) The term "maturity date" means the date on which the mortgage indebtedness would be extinguished if paid in accordance with the periodic payments provided for in the mortgage.

(5) The term "slum or blighted area" means any area where dwellings predominate which, by reason of dilapidation, over-crowing, faulty arrangement or design, lack of ventilation, light or sanitation facilities, or any combination of these factors, are detrimental to safety, health, or morals.

(6) The term "rental housing" means housing, the occupancy of which is permitted by the owner

thereof in consideration of the payment of agreed charges, whether or not, by the terms of the agreement, such payment over a period of time will entitle the occupany to the ownership of the premises or space in a manufactured home court or part properly arranged and equipped to accommodate manufactured homes.

(7) The term "State" includes the several States, and Puerto Rico, the District of Columbia, Guam, the Trust Territory of the Pacific Islands, and the Virgin Islands.

Insurance of Additional Mortgages

(b) In addition to mortgages insured under section 1709 of this title, the Secretary is authorized to insure mortgages as defined in this section (including advances on such mortgages

during construction) which cover property held by--

(1) Federal or State instrumentalities, municipal corporate instrumentalities of one or more States, or limited dividend or redevelopment or housing corporations restricted by Federal or State laws or regulations of State banking or insurance departments as to rents, charges, capital structure, rate of return, or methods of operation; or

(2) any other mortgagor approved by the Secretary which, until the termination of all obligations of the Secretary under the insurance and during such further period of time as the Secretary shall be the owner, holder, or reinsurer of the mortgage, is regulated or restricted by the

Secretary as to rents or sales, charges, capital structure, rate of return, and methods of operation to such extent and in such manner as to provide reasonable rentals to tenants and a reasonable return on the investment. The Secretary may make such contracts with and acquire, for not to exceed $100, such stock or interest in the mortgagor as he may deem necessary to render effective the regulations or restrictions. The stock or interest acquired by the Secretary shall be paid for out of the General Insurance Fund, and shall be redeemed by the mortgagor at par upon the termination of all obligations of the Secretary under the insurance.

The insurance of mortgages under this section is intended to facilitate

particularly the production of rental accommodations, at reasonable rents, of design and size suitable for family living. The Secretary is, therefore, authorized and directed in the amdinistration of this section to take action, by regulation or otherwise, which will direct the benefits of mortgage insurance hereunder primarily to those projects which make adequate provision for families with children, and in which every effort has been made to achieve moderate rental charges.

Notwithstanding any other provisions of this section, no mortgage shall be insured hereunder unless the mortgagor certifies under oath that in selecting tenants for the property covered by the mortgage he will not discriminate against any family by reason of the fact that there are children in the family, and that he will not sell the property while

the insurance is in effect unless the purchaser so certifies, such certification to be filed with the Secretary. Violation of any such certification shall be a misdemeanor punishable by a fine of not to exceed $500.

Eligibility for insurance; Mortgage limits

(c) To be eligible for insurance under this section a mortgage on any property or project shall involve a principal obligation in an amount--

(1) Repealed. Pub.L. 93-383, Title III, §304(a)(1), Aug. 22, 1974, 88 Stat. 677.

(2) Not to exceed 90 per centum of the estimated value of the property or project (when the proposed improvements are completed): Provided, That this limitation shall not apply to

mortgages on housing in Alaska or in Guam, but such a mortgage may involve a principal obligation in an amount not to exceed 90 per centum of the amount which the Secretary estimates will be the replacement cost of the property or project when the proposed improvements are completed (the value of the property or project as such term is used in this paragraph may include the land, the proposed physical improvements, utilities within the boundaries of the property or project, architect's fees, taxes, and interest accruing during construction, and other miscellaneous charges incident to construction and approved by the Secretary): And provided further, That nothing contained in this section shall preclude the insurance of mortgages covering existing

construction located in slum or blighted areas, as defined in paragraph (5) of subsection (a) of this section, and the Secretary may require such repair or rehabilitation work to be completed as is, in his discretion, necessary to remove conditions detrimental to safety, health, or morals; and

(3) Not to exceed, for such part of the property or project as may be attributable to dwelling use (excluding exterior land improvements as defined by the Secretary), $19,500 per family unit without a bedroom, $21,600 per family unit with one bedroom, $25,800 per family unit with two bedrooms, $31,800 per family unit with three bedrooms, and $36,000 per family unit with four or more bedrooms or not to exceed $8,000 per space; except that as to

projects to consist of elevator-type structures the Secretary may, in his discretion, increase the dollar amount limitations per family unit to not to exceed $22,500 per family unit without a bedroom, $25,200 per family unit with one bedroom, $30,900 per family unit with two bedrooms, $38,700 per family unit with three bedrooms, and $43,758 per family unit with four or more bedrooms, as the case may be, to compensate for the higher costs incident to the construction of elevator-type structures of sound standards of construction and design; and except that the Secretary may, by regulation, increase any of the foregoing dollar amount limitations contained in this paragraph by not to exceed 75 per centum in any geographical area

where he finds that cost levels so require, except that, where the Secretary determines it necessary on a project by project basis, the foregoing dollar amount limitatios contained in this paragraph may be exceeded by not to exceed 90 per centum in such an area. Notwithstanding any other provision of this paragraph, the amount which may be insured under this section may be increased by up to 20 percent if such increase is necessary to account for the increased cost of the project due to the installation of a solar energy system (as defined in subparagraph (3) of the last paragraph of section 1703(a) of this title) or residential energy conservation measures (as defined in section 8211(11)(A) through (G) and (I) of Title 42) in cases where the

Secretary determines that such measures are in addition to those required under the minimum property standards and will be cost effective over the life of the measure therein.

The mortgage shall provide for complete amortization by periodic payments within such term as the Secretary shall prescribe, and shall bear interest (exclusive of premium charges for insurance) at not to exceed 5 1/4 per centum per annum on the amount of the principal obligation outstanding at any time, or not to exceed such per centum per annum not in excess of 6 per centum as the Secretary finds necessary to meet the mortgage market. The Secretary may consent to the release of a part or parts of the mortgage property from the lien of

the mortgage upon such terms and conditions as he may prescribe and the mortgage may provide for such release. No mortgage shall be accepted for insurance under this section or section 1715a of this title unless the Secretary finds that the property or project, with respect to which the mortgage is executed, is economically sound. Such proerty or project may include five or more family units and may include such commercial and community facilities as the Secretary deems adequate to serve the occupants.

Premium appraisal, and inspection charges

(d) The Secretary shall collect a premium charge for the insurance of mortgages under this section which shall be payable annually in advance by the mortgagee, either in cash or in debentures issued by the Secretary under any

subchapter and section of this chapter, except debentures of the Mutual mortgage Insurance Fund, or of the Cooperative Management Housing Insurance Fund at par plus accrued interest. In addition to the premium charge herein provided for, the Secretary is authorized to charge and collect such amounts as he may deem reasonable for the appraisal of a property or project during construction: Provided, That such charges for appraisal and inspection shall not aggregate more than 1 per centum of the original principal face amount of the mortgage.

Adjusted premium charge on payment of mortgage

(e) In the event that the principal obligation of any mortgage accepted for insurance under this section is paid in full prior to the maturity date, the Secretary is authorized in his discretion to require the payment by the mortgagee

of an adjusted premium charge in such amount as the Secretary determines to be equitable, but not in excess of the aggregate amount of the premium charges that the mortgagee would otherwise have been required to pay if the mortgage had continued to be insured until such maturity date.

(f) Repealed. Pub.L. 89-117, Title XI, §1108(e)(3), Aug. 10, 1965, 79 Stat. 504.

Payment of insurance after default

(g) The failure of the mortgagor to make any payment due under or provided to be paid by the terms of a mortgage insured under this section shall be considered a default under such mortgage and, if such default continues for a period of thirty days, the mortgagee shall be entitled to receive the benefits of the insurance as hereinafter provided,

upon assignment, transfer, and delivery to the Secretary, within a period and in accordance with rules and regulations to be prescribed by the Secretary of (1) all rights and interests arising under the mortgage so in default; (2) all claims of the mortgagee against the mortgagor or others, arising out of the mortgage transactions; (3) all policies of title or other insurance or surety bonds or other guaranties and any and all claims thereunder; (4) any balance of the mortgage loan not advanced to the mortgagor; (5) any cash or property held by the mortgagee, or to which it is entitled, as deposits made for the account of the mortgagor and which have not been applied in reduction of the principal of the mortgage indebtedness; and (6) all records, documents, books, papers, and accounts relating to the mortgage transaction. Upon such assignment, transfer,

and delivery the obligation of the mortgagee to pay the premium charges for mortgage insurance shall cease, and the Secretary shall, subject to the cash adjustment provided for in subsection (j) of this section, issue to the mortgagee a certificate of claim as provide in subsection (h) of this section, and debentures having a total face value equal to the original principal face amount of the mortgage plus such amount as the mortgagee may have paid for (A) taxes, special assessments, and water rates, which are liens prior to the mortgage; (B) insurance on the property; and (C) reasonable expenses for the completion and preservation of the property and any mortgage insurance premiums paid after default, less the sum of (i) that part of the amount of the principal obligation that has been repaid

by the mortgagor, (ii) an amount equivalent to 1 per centum of the unpaid amount of such principal obligation, and (iii) any net income received by the mortgagee from the property: Provided, That the mortgagee in the event of a default under the mortgage may, at its option and in accordance with regulations of, and in a period to be determined by, the Secretary, proceed to foreclose on and obtain possession of or otherwise acquire such property from the mortgagor after default, and receive the benefits of the insurance as herein provided, upon (1) the prompt conveyance to the Secretary of title to the property which meets the requirements of the rules and regulations of the Secretary in force at the time the mortgage was insured and which is evidenced in the manner prescribed by such rules and regulations, and (2) the assignment to him of all claims of the

mortgagee against the mortgagor or others, arising out of the mortgage transaction or foreclosure proceedings, except such claims that may have been released with the consent of the Secretary. Upon such conveyance and assignment, the obligation of the mortgagee to pay the premium charges for insurance shall cease and the mortgagee shall be entitled to receive the benefits of the insurance as provided in this subsection, except that in such event the 1 per centum deduction, set out in (ii) hereof, shall not apply. Notwithstanding any other provision of this chapter, upon receipt, after September 2, 1964, of an application for insurance benefits on a mortgage insured under this chapter, the Secretary may terminate the mortgagee's obligation to pay premium charges on the mortgage.

Certificate of claim; division of excess proceeds

(h) The certificate of claim issued under this section shall be for an amount which the Secretary determines to be sufficient, when added to the face value of the debentures issued and the cash adjustment paid to the mortgagee, to equal the amount which the mortgagee would have received if, on the date of the assignment, transfer and delivery to the Secretary provided for in subsection (g) of this section, the mortgagor had extinguished the mortgage indebtedness by payment in full of all obligations under the mortgage and a reasonable amount for necessary expenses incurred by the mortgagee in connection with the foreclosure proceedings, or the acquisition of the mortgaged property otherwise, and the conveyance thereof to the Secretary. Each such certificate of claim shall

provide that there shall accrue to the holder of such certificate with respect to the face amount of such certificate, an increment at the rate of 3 per centum per annum which shall not be compounded. If the net amount realized from the mortgage, and all claims in connection therewith, so assigned, transferred, and delivered, and from the property covered by such mortgage and all claims in connection with such property, after deducting all expenses incurred by the Secretary in handling, dealing with, acquiring title to, and disposing of such mortgage and property and in collecting such claims, exceeds the face value of the debentures issued and the cash adjustment paid to the mortgagee plus all interest paid on such debentures, such excess shall be divided as follows:

(1) If such excess is greater than the total amount payable under

the certificate of claim issued in connection with such property, the Secretary shall pay to the holder of such certificate the full amount so payable, and any excess remaining thereafter shall be retained by the Secretary and credited to the General Insurance Fund; and

(2) If such excess is equal to or less than the total amount payable under such certificate of claim, the Secretary shall pay to the holder of such certificate the full amount of such excess.

Debentures; execution; negotiability; terms; tax exemptions

(i) Debentures issued under this section shall be executed in the name of the General Insurance Fund as obligor, shall be signed by the Secretary, by either his written or engraved signature,

shall be negotiable, and shall be dated as of the date of default as determined in subsection (g) of this section, except that debentures issued pursuant to the provisions of sections 1715k(f), 1715l (g), and 1715x of this title may be dated as of the date the mortgage is assigned (or the property is conveyed) to the Secretary and shall bear interest from such date. They shall bear interest at a rate established by the Secretary pursuant to section 1715o of this title payable semiannually on the 1st day of January and the 1st day of July of each year, and shall mature twenty years after the date thereof. Such debentures as are issued in exchange for mortgages insured after February 3, 1938, shall be exempt, both as to principal and interest, from all taxation (except surtaxes, estate, inheritance, and gift taxes) now and hereafter imposed by the United States,

by any Territory, dependency, or possession thereof, or by any State, county, municipality, or local taxing authority. They shall be paid out of the General Insurance Fund which shall be primarily liable therefor, and they shall be fully and unconditionally guaranteed as to principal and interest by the United States, and such guaranty shall be expressed on the face of the debentures. In the event the General Insurance Fund fails to pay upon demand, when due, the principal of or interest on any debentures so guaranteed, the Secretary of the Treasury shall pay to the holders the amount thereof which is authorized to be appropriated, out of any money in the Treasury not otherwise appropriated, and thereupon, to the extent of the amount so paid, the Secretary of the Treasury shall succeed to all the rights of the holders of such debentures.

Debentures; form and demonination

(j) Debentures issued under this section shall be in such form and denominations in multiples of $50, shall be subject to such terms and conditions, and shall include such provision for redemption, if any, as may be prescribed by the Secretary with the approval of the Secretary of the Treasury, and may be in coupon or registered form. Any difference between the amount of debentures to which the mortgagee is entitled under this section, and the aggregate face value of the debentures issued, not to exceed $50, shall be adjusted by the payment of cash by the Secretary to the mortgagee from the General Insurance Fund.

Acqusition of property by conveyance or foreclosure

(k) The Secretary is authorized either to (1) acquire possession of and title to any property, covered by a mortgage insured under this section and assigned to him, by voluntary conveyance in extinguishment of the mortgage indebtedness, or (2) institute proceedings for foreclosure on the property covered by any such insured mortgage and prosecute such proceedings to conclusion. The Secretary at any sale under foreclosure may, in his discretion, for the protection of the General Insurance Fund, bid any sum up to but not in excess of the total unpaid indebtedness secured by the mortgage, plus taxes, insurance, foreclosure costs, fees, and other expenses, and may become the purchaser of the property at such sale. The Secretary is authorized to pay from the General

Insurance Fund such sums as may be necessary to defray such taxes, insurance, costs, fees, and other expenses in connection with the acquisition or foreclosure of property under this section. Pending such acquisition by voluntary conveyance or by foreclosure, the Secretary is authorized, with respect to any mortgage assigned to him under the provisions of subsection (g) of this section, to exercise all the rights of a mortgagee under such mortgage, including the right to sell such mortgage, and to take such action and advance such sums as may be necessary to preserve or protect the lien of such mortgage.

Handling and disposal of property; settlement of claims

(1) Notwithstanding any other provisions of law relating to the acquisition, handling, or disposal of real and

other property by the United States, the Secretary shall also have power, for the protection of the interests of the General Insurance Fund, to pay out of the General Insurance Fund all expenses or charges in connection with, and to deal with, complete, reconstruct, rent, renovate, modernize, insure, make contracts for the management of, or establish suitable agencies for the management of, or sell for cash or credit or lease in his discretion, any proerty acquired by him under this section; and notwithstanding any other provision of law, the Secretary shall also have power to pursue to final collection by way of compromise or otherwise all claims assigned and transferred to him in connection with the assignment, transfer, and delivery provided for in this section, and at any time, upon default, to foreclose on any property secured by any mortgage assigned

and transferred to or held by him: Provided, That section 5 of Title 41 shall not be construed to apply to any contract for hazard insurance, or to any purchase or contract for services or supplies on account of such property if the amount thereof does not exceed $1,000.

(m) Repealed. Pub.L. 89-117, Title XI, § 1108(e)(3), Aug. 10, 1965, 79 Stat. 504.

Default or payment; rights of parties

(n) In the event that a mortgage insured under this section becomes in default through failure of the mortgagor to make any payment due under or provided to be paid by the terms of the mortgage and such mortgage continues in default for a period of thirty days, but the mortgagee does not foreclose on or otherwise acquire the property, or does

not assign and transfer such mortgage and the credit instrument secured thereby to the Secretary, in accordance with subsection (g) of this section, and the Secretary is given written notice thereof, or in the event that the mortgagor pays the obligation under the mortgage in full prior to the maturity thereof, and the mortgagee pays any adjusted premium charge required under the provisions of subsection (e) of this section, and the Secretary is given written notice by the mortgagee of the payment of such obligation, the obligation to pay the annual premium charge for insurance shall cease, and all rights of the mortgagee and the mortgagor under this section shall terminate as of the date of such notice.

Reissue of prior insurance

(o) The Secretary, with the consent of the mortgagee and the mortgagor of a mortgage insured under this section prior to February 3, 1938, shall be empowered to reissue such mortgage insurance in accordance with the provisions of this section as amended by the National Housing Act Amendments of 1938, and any such insurance not so reissued shall not be affected by the enactment of such Act.

(p) Repealed. Pub.L. 89-117, Title XI, § 1108(e)(3), Aug. 10, 1965, 79 Stat. 504.

(q) Repealed. Pub.L. 85-104, Title I, §111, July 12, 1957, 71 Stat. 297.

Service charge for mortgages assigned to and held by Secretary

(r) Notwithstanding any other provision of this chapter, the Secretary is authorized to include in any mortgage

insured under any subchapter of this chapter after September 23, 1959, a provision requiring the mortgagor to pay a service charge to the Secretary in the event such mortgage is assigned to and held by the Secretary. Such service charge shall not exceed the amount prescribed by the Secretary for mortgage insurance premiums applicable to such mortgage.

APPENDIX I

12 U.S.C. Section 1731a

Notwithstanding any other provision of law, the Secretary is authorized to refuse the benefits of participation (either directly as an insured lender or as a borrower, or indirectly as a builder, contractor, or dealer, or salesman or sales agent for a builder, contractor or dealer) under subchapters I, II, VI, VII, VIII, IX-A, IX-B or X of this chapter to any person or firm (including but not limited to any individual, partnership, association, trust, or corporation) if the Secretary has determined that such person or firm (1) has knowingly or willfully violated any provision of this chapter or of Title III of the Servicemen's Readjustment Act of 1944, as amended, or of chapter 37 of Title 38, or of any regulation issued by

the Secretary under this chapter or by the Administrator of Veteran's Affairs under said Title III, or chapter 37, or (2) has, in connection with any construction, alteration, repair or improvement work financed with assistance under this chapter or under said Title III, or chapter 37, or in connection with contracts or financing relating to such work, violated any Federal or State penal statute, or (3) has failed materially to properly carry out contractual obligations with respect to the completion of construction, alteration, repair, or improvement work financed with assistance under this chapter or under Title III of the Servicemen's Readjustment Act of 1944, as amended, or of chapter 37 of Title 38. Before any such determination is made any person or firm with respect to whom such a determination is proposed shall be notified in writing by the

Secretary and shall be entitled, upon making a written request to the Secretary, to a written notice specifying charges in reasonable detail and an opportunity to be heard and to be represented by counsel. Determination made by the Secretary under this section shall be based on the preponderance of the evidence. For the purposes of compliance with this section the Secretary's notice of a proposed determination under this section shall be considered to have been received by the interested person or firm if the notice is properly mailed to the last known address of such person or firm.

APPENDIX J

24 CFR §207.18(c)

(c) In the case of a private corporation, the Commissioner's regulations or restrictions will be set forth in its certificate of incorporation or charter under which such mortgagor is created, and will be made effective through the issuance of certain shares of special stock, which stock will acquire majority voting rights in the event of default under the mortgage or violation of a provision of the charter. Such special stock or interest issued to the Commissioner, his nominee or nominees and/or the Federal Housing Administration shall be in sufficient amount to constitute under the laws of the particular state a valid special class of stock or interest and shall be issued in consideration of the payment by the

Commissioner of not exceeding in the aggregate $100. Such stock shall be represented by a certificate or certificates issued in the name of the Commissioner, and/or in the name of his nominee or nominees, and/or in the name of the Federal Housing Administration, as the Commissioner shall require. In the case of a private association or trust entity, or whenever, for any reason satisfactory to the Commissioner, such regulations or restrictions are not feasible as to a particular mortgagor through the issuance of shares of special stock, such regulations or restrictions shall be effected by means of a regulatory agreement and/or other contractual documents between the Commissioner and the mortgagor in such form and in such manner as shall be satisfactory to the Commissioner. Upon the termination of all obligations of the Commissioner under his contract of

mortgage insurance, or any succeeding contract or agreement covering the mortgage obligation, all regulations and restrictions of the mortgagor shall cease, the shares of special stock shall be surrendered by the Commissioner upon reimbursement of his payments therefor, plus accrued dividends, if any, thereon, and any regulatory agreement or contract shall terminate.

APPENDIX K

24 CFR §207.19(e)

(c) Rents and charges. No charge shall be made by the mortgagor for the accommodations, facilities or services offered by the project in excess of those approved by the Commissioner in writing prior to the opening of the project for rental. In approving such charges and in passing upon applications for changes, consideration will be given to the following and similar factors:

(1) Rental income necessary to maintain the economic soundness of the project.

(2) Rental income necessary to provide reasonable return on the investment consistent with providing reasonable rentals to tenants.

APPENDIX L

Barbara FALZARANO et al.,
Plaintiffs-Appellants,

v.

UNITED STATES of America et al.,
Defendants-Appellees.

No. 78-1512.

United States Court of Appeals,
First Circuit.

Argued April 2, 1979.

Decided October 2, 1979.

607 F.2d 506

Before COFFIN, Chief Judge, CAMPBELL and BOWNES, Circuit Judges.

BOWNES, Circuit Judge.

Plaintiffs-appellates are certain tenants in two federally subsidized housing projects located in Boston. They filed a class action suit against the United States, the Secretary of Housing and Urban Development (HUD), and the Acting Director of the HUD Area Office in Boston. They named as private defendants

the owners and managers of the two housing projects, Max and William Kargman, High Point Village Company, Brandywyne Village Company, First Realty Management Corporation, First Realty Corporation of Boston, and Lease-All Corporation.

The original complaint was 240 pages long. It alleged a scheme of siphoning funds by the private defendants from the projects in excess of the legally permissible limits and the federal defendants' acquiescence in the scheme. As a result of the scheme, plaintiffs averred that they had to pay excessively high rents and live in deteriorated housing.

The defendants moved to dismiss the complaint on three grounds: lack of jurisdiction, Fed.R.Civ.P. 12(b)(1); failure to state a claim, Fed.R.Civ.P. 12(b)(6), on the basis that our decision in Hahn v. Gotlieb, 430 F.2d 1243 (1st

Cir. 1970), disposed of the matter; and on the further ground that the complaint failed to comply with the requisites of Fed.R.Civ.P. 8(a), which calls for a "short and plain statement of the claim[.]" The district court granted the motion to dismiss for failure to state a claim, also noting that the prolixity of the complaint offended Fed.R.Civ.P. 8(a). Plaintiffs have appealed from the dismissal. After filing the appeal, plaintiffs moved to vacate the dismissal with leave to amend the complaint and substitute an abbreviated complaint of 70 pages with a 40 page attached appendix. The district court denied the motion, stating that the amended complaint did not clear the hurdles posed by the original complaint.[1]

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[1] The district court expressed reservations as to whether it coul[illegible] act on the (continued)

We treat first the jurisdictional question. Plaintiffs forward several bases for asserting their claims against the private defendants in a federal forum: (1) an implied right of action under the National Housing Act, 12 U.S.C. § 1715(d)(3); (2) as third party beneficiaries of the regulatory agreement between the landlords and HUD; (3) under their lease, which incorporates the regulatory agreement by reference; (4) under the fourteenth amendment, for deprivation of their rights under color of state law. Jurisdiction is claimed under 28 U.S.C. §§ 1331,, 1343, 1337, and 1361. Each of the cited statutes

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motion since an appeal was then pending in this court. This ambiguity has been resolved by our recent case of Commonwealth of Puerto Rico v. S.S. Zoe Colocotroni, 601 F.2d 39 (1st Cir. 1979) (permissible to file motion for relief from judgment pursuant to Fed.R.Civ.P. 60(b) while appeal is pending without first seeking leave from the court of appeals).

requires that the cause of action be tethered to either a substantive statute or the federal constitution. We examine each of the four grounds advanced by plaintiffs to determine if any provides them the right to proceed in a federal court.[2]

A.

The National Housing Act, 12 U.S.C. § 1715(d)(3), does not expressly provide for a private right of action. That section reads in pertinent part:

> (d) To be eligible for insurance under this seciton, a mortgage shall--
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> * * *

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[2] In their proposed amended complaint, plaintiffs suggest that their claim arises under the Administrative Procedure Act, 5 U.S.C. §§ 701 et seq. The APA is not available as an independent grant of subject matter jurisdiction. Califano v. Sanders, 430 U.S. 99, 104-07, 97 S.Ct. 980, 51 L.Ed.2d 192 (1977).

> (3) if executed by a private nonprofit cororation or association, or other mortgagor approved by the Secretary, and regulated or supervised under Federal or State laws . . ., or agencies thereof, or by the Secretary under a regulatory agreement or otherwise, as to rents, charges, and methods of operation, in such form and in such manner as in the opinion of the Secretary will effectuate the purposes of this section--
>
> * * *
>
> (ii) not exceed [certain set sums, established by law][.]

By its terms, the statute does not create a right of action in favor of anyone. See Touche Ross & Co. v. Redington, ___ U.S. ___, 99 S.Ct. 2479, 61 L.Ed.2d 82 (1979). It does, however, proscribe mortgages in excess of the legally permissible per unit limit. There has been no allegation that the mortgages executed on the projects exceed the statutory limits; rather, the claim is that the rents are excessive and the

physical plant unsafe and unclean due to monies taken illegally from the projects by the landlords. The language of the statute neither creates federal rights in favor of any private party nor proscribes the behavior herein complained of. Therefore, the impropriety of inferring a federal cause of action from the statute seems clear. This view is buttressed by an application of the analysis of the factors set forth in Cort v. Ash, 422 U.S. 66, 95 S.Ct. 2080, 45 L.Ed.2d 26 (1975), for determining whether a cause of action can be inferred from a statute not expressly providing for one.

We first determine whether plaintiffs constitute the class for whose especial benefit the statute was passed. Low and moderate income tenants are indisputably the prime beneficiaries of the National Housing Act. 42 U.S.C. §§ 1441, 1441a. They are not the sole

beneficiaries, however, since Congress decided to utilize the private sector to provide the necessary housing and made mortgage insurance and below-market interest rates available to encourage private enterprise to enter the low and moderate income housing market. 12 U.S.C.§ 1715(a), (d)(5). We think this case is governed by Touche Ross & Co. v. Redington, supra, ___ U.S. ___, 99 S.Ct. 2479, 61 L.Ed.2d 82, where the Court found no implied cause of action in section 17(a) of the Securities and Exchange Act of 1934, 15 U.S.C. § 78q(a). There, investors had sought damages against accountants who had audited securities brokerage firms. The financial reports contained errors and the customers sought to recover from the auditors when the collapse of the firm deprived them of the full value of their deposits and assets held by the bankrupt

brokerage firm. By statute, the brokerage firms were required to keep books and records and submit reports as the SEC might require "as necessary and appropriate in the public interest or for the protection of investors." 15 U.S.C. § 78q(a) (as it read in 1972, the date in question). Although the statute spoke clearly in terms of protecting the public, the Court found that injured investors had no cause of action, finding that the intent of the statute was to provide sufficient data to the SEC so that it would have an early warning of financial troubles and thus be able to take protective action before financial collapse. Even when, as in the case before the Court, the statute was unsuccessful in achieving its goal, investors could not bring suit for damages against anyone. Touche Ross, supra, ___ U.S. at ___, 99 S.Ct. 2479.

Here also, while the statute states that the Secretary shall establish permissible rents and charges, no cause of action is created on behalf of the tenants. Continued financial viability of the project is a prime concern of the statute since the goverment, as insurer of the mortgages, will bear the brunt should there by a default. By authorizing the Secretary to set rents and charges the statute attempts to assure adequate return sufficient to prevent foreclosure while also keeping a lid on rents for the benefit of low and moderate income tenants. See Kargman v. Sullivan, 552 F.2d 2, 12 (1st Cir. 1977); 24 C.F.R. § 221.531(c). The statute does not purport to grant to the residents of the projects the right to sue for impermissible charges. Authority is given to the

Secretary to seek enforcement if necessary. 12 U.S.C. § 1702.[3]

The second Cort factor leads us to examine if there is any indication of legislative intent to create or deny a private remedy. The parties agree that neither the statute nor the legislative history indicates that Congress intended to create or deny a private right of action. Where, as here, the plain language of the statute "weighs against implication of a private remedy, the fact that there is no suggestion whatsoever in the legislative history that [the Act] may give rise to suits for damages reinforces our decision not to find such a right of action implicit within [the

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[3] This section, which states that the Secretary shall be authorized to "sue and be sued in any court of competent jurisdiction, State or Federal[]", does not operate as a basis for a private right of action. Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 420-21 n. 3, 95 S.Ct. 1733, 44 L.Ed.2d 263 (1975).

Act]." Touche Ross, supra, ___ U.S. at ___, 99 S.Ct. at 2487.

The next factor is whether a private right of action would be consonant with the overall legislative scheme. By providing for below-market interest rates and insuring the mortgages, the Act manifests an intent to stimulate the private sector's entry into constructing and operating housing projects for low and moderate income tenants. To safeguard the federal fisc against possibly disastrous exposure should the insured mortgages be foreclosed, the Secretary of HUD is permitted to regulate rents, charges and methods of operation. An overriding concern is to guarantee that the rents and charges adequately cover the carrying costs of the projects. The discretion granted to the Secretary is broad indeed: the Secretary may determined both the form and manner of

regulation which, in his or her opinion, will effectuate the purposes of section 1715l. Tenants are guaranteed cerrtain notice and hearing rights, particularly with respect to rent increases. 24 C.F.R. §§ 401.1-401.5. Permitting tenants to bring suit when they differ with the Secretary's determinations as to the adequacy of rents and charges would not, we think, harmonize with the Act's intent. See Hahn v. Gotlieb, supra, 430 F.2d 1243. Tenants are protected from excessive rents since they are able to obtain federal supplements in certain instances to cover rent increases.

The overall statutory scheme suggests that no private right of action exists. Unlike the Securities and Exchange Act of 1934, the National Housing Act contains no "standards of conduct that a private action could help to enforce," nor does it contain any

"general grant of jurisdiction to the district courts." Securities Investor Protection Corp. v. Barbour, 421 U.S. 412, 424, 95 S.Ct. 1733, 1740, 44 L.Ed.2d 263 (1975). It is thus distinguishable from Title IX of the Education Amendments of 1972, 20 U.S.C. §§ 1681 et seq., which the Court this term determined to contain an implied private right of action. Cannon v. University of Chicago, 441 U.S. 677, 99 S.Ct. 1946, 60 L.Ed.2d 560 (1979). Title IX specifically enjoins sex discrimination in education programs receiving federal funds and explicitly bestows a benefit upon people discriminated against on the basis of sex. Id. 441 U.S. at 677, 99 S.Ct. 1946. There is no similar creation of benefits for the tenant class in the case before us.

We are not unsympathetic to plaintiffs' claims, which--as we must in a motion to dismiss--we take as true.

However, in the absence of a justiciable claim, we are not empowered to act. The statute does not grant a private right of action.

B.

Plaintiffs allege that they are entitled to recover on the grounds that they are third party beneficiaries of the regulatory agreement between HUD and the landlords. This theory has been raised and rejected before. In Harlib v. Lynn, 511 F.2d 51 (7th Cir. 1975), the court rejected tenants' argument that they were third party beneficiaries of the regulatory agreement since the agreement did not specify in any fashion notice or hearing rights for tenants. Id. at 55-56. See also Boston Public Housing Tenants Policy Council, Inc v. Lynn, 388 F.Supp. 493, 496 (D.Mass.1974); Fenner v. Bruce Manor, Inc., 409 F.Supp. 1332, 1349 (D.Md.1976); Feldman v.. HUD, 430 F.Supp.

1324, 1328 (E.D.Pa. 1977). Cf. McCullough v. Redevelopment Authority of Wilkes-Barre, 522 F.2d 858, 867-68 n. 27 (3rd Cir. 1975) (owners of property damaged by hurricane not third party beneficiaries to contact between HUD and the local Authority).

Our inquiry must be whether plaintiffs were intended beneficiaries under the regulatory agreement, as merely incidental beneficiaries cannot sue to enforce the contract. Restatement of Contracts § 145; 4 Corbin on Contracts §§ 774, 775, 776, 779C (1951). The regulatory agreements at issue here do not disclose an intent to benefit the tenants, except as they might be incidental beneficiaries; nor can the tenants qualify as either creditor or donor beneficiaries. There is, therefore, no basis for federal jurisdiction grounded on a third party beneficiary theory.

C.

Plaintiffs claim that they have a federal cause of action because their lease agreements with the private defendants incorporate the regulatory agreements between the landlords and HUD. Plaintiffs did not rely on this as a basis for federal jurisdiction in the court below; they are, therefore, effectively foreclosed from raising it before us. Johnston v. Holiday Inns, Inc., 959 F.2d 890 (1st Cir. 1979).

D.

We are finally asked to find a violation of the fourteenth amendment's prohibition against denial of due process. The fourteenth amendment's proscription runs only against states, not against private entities. Plaintiffs allege that, since the landlords are regulated with respect to zoning variances, reduced utility rates, payment of

taxes and the like, they are operating under color of state law. This is an insufficient allegation of state action to involve the fourteenth amendment. Moose Lodge No. 107 v. Irvis, 407 U.S. 163, 171-79, 92 S.Ct. 1965, 32 L.Ed.2d 627 (1972). None of these activities is "so entwined with governmental policies or so impregnated with a governmental character as to become subject to the constitutional limitations placed upon state action." Evans v. Newton, 382 U.S. 296, 299, 86 S.Ct. 486, 488, 15 L.Ed.2d 373 (1966). Even though the housing projects have received certain benefits from the state such as reduced utility rates and reduced taxation, this does not create a "symbiosis" between state and public action. See Fortin v. Darlington Little League, Inc., 514 F.2d 344, 347 (1st Cir. 1975). See also Burton v. Wilmington Parking Authority, 365 U.S.

715, 722-26, 81 S.Ct. 856, 6 L.Ed.2d 45 (1961). The projects are privately owned and operated, albeit regulated in some operational respects by federal overseers. The badge of "public entity" cannot fairly be attached to them. There has been no allegation that the property was purchased by the private defendants from the state following urban renewal condemnation proceedings, where the law requires that restrictions be placed on the further use and disposition of the property, 42 U.S.C. §§ 1460(c)(4), 1455, 1457, compare McQueen v. Druker, 438 F.2d 781, 783 (1st Cir. 1971), or that constitutionally protected activities such as free speech are being imperilled. Compare id. Even had there been the requisite showing of state involvement, plaintiffs have failed to show a legal entitlement or property inteest such as to trigger constitutional guarantees.

Hahn v. Gottlieb, supra, 430 F.2d at 1247.

II. Have Plaintiffs State A Claim Against HUD?

Plaintiffs attempt to hurdle the bar posed by our decision in Hahn v. Gottlieb, supra, 430 F.2d 1243. They assert that they are not challenging HUD's approval of a rent increase, as was the case in Hahn. Rather, they claim they are challenging the pervasive failure of HUD to enforce its own regulations. At the outset we recognize the bias in favor of judicial review. Morris v. Gressette, 432 U.S. 491, 501, 97 S.Ct. 2411, 53 L.Ed.2d 506 (1977); Abbott Laboratories v. Gardner, 387 U.S. 136, 140, 87 S.Ct. 1507, 18 L.Ed.2d 681 (1967). If, however, the action has been entirely committed by statute to administrative discretion, review is precluded. 5 U.S.C. §701(a)(2). If the matter can

be resolved solely on the basis of "matters within the special competence of the Secretary[]", Barlow v. Collins, 397 U.S. 159, 166, 90 S.Ct. 832, 837, 25 L.Ed.2d 192 (1970), it is fair to determine that the matter falls within the narrow range of cases not reviewable by courts. Indeed, a "command" of nonreviewability may be inferred from the statute's purpose. Id. at 167, 90 S.Ct. 832; Switchmen's Union of North America v. National Mediation Board, 320 U.S. 297, 301-07, 64 S.Ct. 95, 88 L.Ed. 61 (1943).

Plaintiffs aver that the amounts taken by the private defendants to cover the costs of managing and maintaining the two housing projects are excessive because of phantom costs such as salaries to the individual defendants greatly in excess of any actual services performed, higher than normal charges by the owners'

subsidiary leasing corporation, characterizing certain charges as maintenance rather than capital expenses, and inflating the land value of the projects. We accept as true these allegations. Nonetheless, the Secretary of HUD has determined that the charges are permissible. No more than we were able to assess the fairness and equity of rent increases in Hahn are we able to assess the propriety of the complained of charges by the private defendants. As stated above, the Secretary of HUD is concerned not only with the level of rents in the housing projects, but also with the projects' continuing financial viability lest the government be called on to assume the costs of the mortgage as insurer.[4] How the Secretary makes

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[4] Plaintiffs state that the mortgages have been in defualt or under modification since 1971 and 1973.

this decision involves a balancing of factors and a consideration of complex financial data which we are ill-equipped to second guess. What plaintiffs in fact are stating is not that the Secretary has failed to regulate the projects, but rather that plaintiffs differ with the manner in which that regulation is carried out. This places them squarely within Hahn. See also Haas v. Howard, 579 F.2d 654, 658 (1st Cir. 1978). HUD has not ignored a plain statutory duty, it has merely interpreted that duty in a fashion other than what plaintiffs consider proper. This does not escape the holding of Hahn.

The principles enunciated in Hahn for ascertaining the applicability of judicial review are: appropriateness of the issue for judicial review; need for judicial supervision to safeguard plaintiffs' interests; and impact of review on

agency's effectiveness in carrying out its mandate. 430 F.2d at 1249. The level of charges--whether characterized as an illegal siphoning of funds or higher than normal charges--is clearly outside the scope of normal judicial competence. We are not able to calculate appropriate rates of return and decipher from quantities of financial data which charges are legitimate and which not. This is a managerial function with which the Secretary has been encharged and which is inappropriate for courts to assume.

As we noted in Hahn, plaintiffs' interests are worthy of protection. However, we cannot say any more clearly here what we said there: the statutory scheme does not provide tenants with detailed statutory protection or categorical assistance, but instead attempts to address tenants' needs indirectly,

both through subsidized private housing and rental supplements. Plaintiffs allege that rents have been raised 40% since 1974 and that physical deterioration is daily occurring at the projects. These allegations are serious and troublesome. And yet, the constraints in Hahn--the delays attendant on judicial resolution of controversies such as this, the courts' inability to adequately sift through detailed and complicated financial and managerial data, and the possibility of landlord appeals from decisions favorable to tenants--operate with equal force here. If plaintiffs were able to find instances of the agency's avoiding mandatory duties, our role would be clear. The allegations we have been presented with, however, amount to arguments that HUD has erred in allowing the landlords to take out certain monies from the project and has erroneously

approved certain charges.[5] This falls short of a showing that HUD has ignored a clear statutory command.

The discretionary nature of the Secretary's duties and the dual goals of assuring financial integrity of the project and maintaining reasonable rents for low and moderate income tenants require a flexibility and ability to deal individually with each project. Close judicial supervision of approval of charges, categorization of charges into one account rather than another, and other formalizations of the decision making process would impede agency action. See Hahn, 430 F.2d at 1250; see

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[5] Plaintiffs cite several cases holding that violations of the regulatory agreements between the landlord and HUD can be enforced via judicial review. Those cases are all distinguishable from the instant one in that the party suing to enforce the agreement was either the United States or the landlords themselves (continued)

also Langevin v. Chenango Court, Inc., 447 F.2d 296, 303 (2d Cir. 1971). Although we find that permitting judicial review of managerial-type decisions would hamper the administrative process, we are not unmindful of--as phrased by Hamlet--the "insolence of office" and the law's delay. The picture which emerges of HUD's treatment of the tenants' complaints is not conducive to confidence in the administrative machinery's ability or willingness to be responsive and responsible to persons dependent upon it for a fair and equitable resolution of their problems. This lack of confidence is in no way dissipated by the treatment of the case in HUD's brief to this court.

---

who were suing the United States or the FHA. In no case cited by plaintiffs was suit brought by the tenants to enforce the agreement. See, e.g., United States v. Haddon Haciendas Co., 541 F.2d 777 (9th Cir. 1976); Bulls v. United States, 356 F.2d 619 (5th Cir. 1966); Loftus v. Mason, 240 F.2d 428 (4th Cir. 1957).

We hope HUD will be mindful of its duties and solicitous in carrying them out.

For the reasons discussed above, mandamus is not available to the plaintiffs. 28 U.S.C. § 1361. Only when the duty is clear and unmistakable is the extraordinary remedy of mandamus appropriate. Cervoni v. HEW, 581 F.2d 1010, 1019 (1st Cir. 1978); Association of American Medical Colleges v. Califano, 569 F.2d 101, 110-14 n. 80 (D.C. Cir. 1977). The Secretary's decision regarding the rents and charges at the two projects is not properly a subject for mandamus jurisdiction in the posture presented to us.

We conclude with the obvious. there is no fifth amendment denial of due process since plaintiffs have shown no protected property interest. Hahn v. Gottlieb, supra, 430 F.2d at 1247.

The order of the district court is affirmed.

APPENDIX M

FHA FORM NO. 2466
Revised November 1969
(Previous Revision obsolete)

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Area Director
San Francisco
Area Office, HUD
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Center, Suite 1600
San Francisco, CA
94111
Attn: R.J. Gillin
Production
Division

U. S. DEPARTMENT OF HOUSING AND URBAN DEVELOPMENT

FEDERAL HOUSING ADMINISTRATION

REGULATORY AGREEMENT FOR
MULTI-FAMILY HOUSING PROJECTS
(Under Sections 207, 220, 221(d)(4),
231 and 232, Except Nonprofits)

Project No. 121-00295

Mortgagee BUHLER MORTGAGE COMPANY INC.

Amount of Mortgage Note $5,049,600.00

Date December 7, 1971

Mortgage: Recorded: CONCURRENTLY HEREWITH
State: California
County: San Francisco
Date December 7, 1971

Originally endorsed for insurance under Section 207 of the National Housing Act, as amended.

This Agreement entered into this seventh day of December, 1971 between TWO THOUSAND BROADWAY, a limited partnership whose address is 320 Sixth Avenue, San Francisco, California, their successors, heirs, and assigns (jointly and severally, hereinafter referred to as Owners) and the undersigned Secretary of Housing and Urban Development and his successors (hereinafter referred to as Secretary).

In consideration of the endorsement for insurance by the Secretary of the above described note or in consideration of the consent of the Secretary to the transfer of the mortgaged property or the sale and conveyance of the mortgaged property by the Secretary, and in order to comply with the requirements of the National Housing Act, as amended and the Regulations adopted by the Secretary pursuant thereto, Owners agree for themselves, their successors, heirs and

assigns, that in connection with the mortgaged property and the project operated thereon and so long as the contract of mortgage insurance continues in effect, and during such further period of time as the Secretary shall be the owner, holder or reinsurer of the mortgage, or during any time the Secretary is obligated to insure a mortgage on the mortgaged property:

1. Owners, except as limited by paragraph 17 hereof, assume and agree to make promptly all payments due under the note and mortgage.

2. (a) Owners shall establish or continue to maintain a reserve fund for replacements by the allocation to such reserve fund in a separate account with the mortgagee or in a safe and

responsible depository designated by the mortgagee, concurrently with the beginning of payments towards amortization of the principal of the mortgage insured or held by the Secretary of an amount equal to $2,003.42 per month unless a different date or amount is approved in writing by the Secretary.

Such funds, whether in the form of a cash deposit or invested in obligations of, or fully guaranteed as to principal by, the United States of America shall at all times be under the control of the mortgagee. Disbursements from such fund, whether for the purpose of effecting replacement of structural elements, and

mechanical equipment of the project or for any other purpose, may be made only after receiving the consent in writing of the Secretary. In the event of a default in the terms of the mortgage, pursuant to which the loan has been accelerated, the Secretary may apply or authorize the application of the balance in such fund to the amount due on the mortgage debt as accelerated.

(b) Where Owners are acquiring a project already subject to an insured mortgage, the reserve fund for replacements to be established will be equal to the amount due to be in such fund under existing agreements or charter provisions at the time Owners acquire such

project, and payments hereunder shall begin with the first payment due on the mortgage after acquisition, unless some other method of establishing and maintaining the fund is approved in writing by the Secretary.

3. Real property covered by the mortgage and this agreement is described in Schedule A attached hereto.

(This paragraph 4 is not applicable to cases insured under Section 232).

4. (a) Owners shall make dwelling accommodation and services of the project available to occupants at charges not exceeding those established in accordance with a rental schedule approved in writing by

the Secretary. Accommodations shall not be rented for a period of less than thirty (30) days, or unless the mortgage is insured under Section 231, for more than three years. Commercial facilities shall be rented for such use and upon such terms as approved by the Secretary. Subleasing of dwelling accommodations, except for subleases of single dwelling accommodations by the tenant thereof, shall be prohibited without prior written approval of Owners and the Secretary and any lease shall so provide. Upon discovery of any unapproved sublease, Owners shall immediately demand cancellation and notify the Secretary thereof.

(b) Upon prior written approval by the Secretary, Owners may charge to and receive from any tenant such amounts as form time to time may be mutually agreed upon between the tenant and the Owner for any facilities and/or services which may be furnished by the Owner or others to such tenant upon his request, in addition to the facilities and services included in the approved rental schedule.

(c) The Secretary will at any time entertain a written request for a rent increase properly supported by substantiating evidence and within a reasonable time shall:

(i) Approve a rental schedule that is necessary to

compensate for any net increase, occurring since the last approved rental schedule, in taxes (other than income taxes) and operating and maintenance cost over which owners have no effective control, or

(ii) Deny the increasse stating the reasons therefor.

5. (a) If the mortgage is originally a Secretary-held purchase money mortgage, or is originally endorsed for insurance under any Section other than Sections 231 or 232, Owners shall not in selecting tenants discriminate against any person or persons by reason of the fact that there are children in the family.

(b) If the mortgage is originally endorsed for insurance under Section 221 or 231, Owners shall in selecting tenants give to persons or families designated in the National Housing Act an absolute preference or priority of occupancy which shall be accomplished as follows:

(1) For a period of sixty (60) days from the date of original offering, unless a shorter period of time is approved in writing by the Secretary, all units shall be held for such preferred applicants, after which time any remaining unrented units may be rented to non-preferred applicants;

(2) Thereafter, and on a continuing basis, such preferred applicants shall be given preference over non-preferred applicants in their placement on a waiting list to be maintained by the Owners; and

(3) Through such further provisions agreed to in writing by the parties.

(c) Without the prior written approval of the Secretary not more than 25% of the number of units in a project insured under Section 231 shall be occupied by persons other than elderly persons as defined by the National Housing Act.

(d) All advertising or efforts to rent a project insured under Section 231 shall reflect a bona fide effort of the Owners

to obtain occupancy by elderly persons as defined by the National Housing Act.

6. Owners shall not without the prior approval of the Secretary:

(a) Convey, transfer, or encumber any of the mortgaged property, or permit the conveyance, transfer or encumbrance of such property.

(b) Assign, transfer, dispose of, or encumber any personal property of the project, including rents, or pay out any funds except from surplus cash, except for reasonable operating expenses and necessary repairs.

(c) Convey, assign, or transfer any beneficial interest in any trust holding title to the property, or the interest of

any general partner in a partnership owning the property, or any right to manage or receive the rents and profits from the mortgaged property.

(d) Remodel, add to, reconstruct, or demolish any part of the mortgaged property or subtract from any real or personal property of the project.

(e) Make, or receive and retain, any distribution of assets or any income of any kind of the project except surplus cash and except on the following conditions:

(1) All distributions shall be made only as of and after the end of a semiannual or annual fiscal period, and

only as permitted by the law of the applicable jurisdiction;

(2) No distribution shall be made from borrowed funds, prior to the completion of the project or when there is any default under this Agreement or under the note or mortgage;

(3) Any distribution or any funds of the project, which the party receiving such funds is not entitled to retain hereunder, shall be held in trust separate and apart from any other funds; and

(4) There shall have been compliance with all outstanding notices of requirements for proper maintenance of the project.

(f) Engage, except for natural persons, in any other business

or activity, including the operation of any other rental project, or incur any liability or obligation not in connection with the project.

(g) Require, as a condition of the occupancy or leasing of any unit in the project any consideration or deposit other than the prepayment of the first month's rent plus a security deposit in an amount not in excess of one month's rent to guarantee the performance of the convenants of the lease. Any funds collected as security deposits shall be kept separate and apart from all other funds of the project in a trust account the amount of which shall at all times equal or exceed the aggregate of all

outstanding obligations under said account.

(h) Permit the use of the dwelling accommodations or nursing facilities of the project for any purpose except the use which was originally intended, or permit commercial use greater than that originally approved by the Secretary.

7. Owners shall maintain the mortgaged premises, accommodations and the grounds and equipment appurtenant thereto, in good repair and condition. In the event all or any of the buildings covered by the mortgage shall be destroyed or damaged by fire or other casualty, the money derived from any insurance on the property shall be applied in

accordance with the terms of insured mortgage.

8. Owners shall not file any petition in bankruptcy or for a receiver or in insolvency or for reorganization or composition, or make any assignment for the benefit of creditors or to a trustee for creditors, or permit an adjudication in bankruptcy or the taking possession of the mortgaged property or any part thereof by a receiver or the seizure and sale of the mortgaged property or any part thereof under judicial process or pursuant to any power of sale, and fail to have such adverse actions set aside within forty-five (45) days.

9. (a) Any management contract entered into by Owners or any of them involving the project shall contain a provision that, in the event of default hereunder, it shall be subject to termination without penalty upon written request by the Secretary. Upon such request Owners shall immediately arrange to terminate the contract within a period of not more than thirty (30) days and shall make arrangements satisfactory to the Secretary for continuing proper management of the project.

(b) Payment for services, supplies, or materials shall not exceed the amount ordinarily paid for such services, supplies, or materials in the

area where the services are rendered or the supplies or materials furnished.

(c) The mortgaged property, equipment, buildings, plans, offices, apparatus, devices, books, contracts, records, documents, and other papers relating thereto shall at all times be maintained in reasonable condition for proper audit and subject to examination and inspection at any reasonable time by the Secretary or his duly authorized agents. Owners shall keep copies of all written contracts or other instruments which affect the mortgaged property, all or any of which may be subject to inspection and examination by

the Secretary or his duly authorized agents.

(d) The books and accounts of the operations of the mortgaged property and of the project shall be kept in accordance with the requirements of the Secretary.

(e) Within sixty (60) days following the end of each fiscal year the Secretary shall be furnished with a complete annual financial report based upon an examination of the books and records of mortgagor prepared in accordance with the requirements of the Secretary, certified to by an officer or responsible Owner and, when required by the Secretary, prepared and certified by a Certified Public Accountant, or

other person acceptable to the Secretary.

(f) At request of the Secretary, his agents, employees, or attorneys, the Owners shall furnish monthly occupancy reports and shall give specific answer to questions upon which information is desired from time to time relative to the income, assets, liabilities, contracts, operation, and condition of the property and the status of the insured mortgage.

(g) All rents and other receipts of the project shall be deposited in the name of the project in a bank, whose deposits are insured by the F.D.I.C. Such funds shall be withdrawn only in accordance

with the provisions of this Agreement for expenses of the project or for distributions of surplus cash as permitted by paragraph 6(e) above. Any Owner receiving funds of the project other than by such distribution of surplus cash shall immediately deposit such funds in the project bank account and failing so to do in violation of this Agreement shall hold such funds in trust. Any Owner receiving property of the project in violation of this Agreement shall immediately deliver such property to the project and failing so to do shall hold such property in trust. As such time as the Onwers shall have lost control and/or possession of the

project, all funds held in trust shall be delivered to the mortgagee to the extent that the mortgage indebtedness has not been satisfied.

(h) If the mortgage is insured under Section 232:

1. The Owners or lessees shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to perate the project as a nursing home and shall not lease all or part of the project except on terms approved by the Secretary.

2. The Owner shall suitably equip the project for nursing home operations.

3. The Owners shall execute a Security Agreement

and Financing Statement (or other form of chattel lien) upon all items of equipment, except as the Secretary may exempt, which are not incorporated as secuirty for the insured mortgage. The Security Agreement and Financing Statement shall constitute a first lien upon such equipment and shall run in favor of the mortgagee as additional security for the insured mortgage.

4. No litigation seeking the recovery of a sum on excess of $3,000 nor any action for specific performance of other equitable relief shall be instituted nor shall any claim for a sum in excess of $3,000 be settled or compromised by the Onwers unless prior written

consent thereto has been obtained from the Secretary. Such consent may be subject to such terms and conditions as the Secretary may prescribe.

(i) If mortgage is insured under Section 231, Owners or lessee shall at all times maintain in full force and effect from the state or other licensing authority such license as may be required to operate the project as housing for the elderly.

Owners will comply with the provisions of any Federal, State, or local law prohibiting discrimination in housing on the grounds of race, color, creed, or national origin, including Title VI of the Civil Rights Act of 1964 (Public Law

88-352, 78 Stat. 241), all requirements imposed by or pursuant to the Regulations of the Deaprtment of Housing and Urban Development (24 CFR, Subtitle A, Part 1) issued pursuant to that title, and regulations issued pursuant to Executive Order 11063.

Upon a violation of any of the above provisions of this Agreement by Owners, the Secretary may give written notice, thereof, to Owners, by registered or certified mail, addressed to the addresses stated in this Agreement, or such other addresses as may subsequently, upon appropriate written notice thereof to the Secretary, be designated by the Onwers as their legal business

address. if such violation is not corrected to the satisfaction of the Secretary within thirty (30) days after the date such notice is mailed or within such further time as the Secretary determines is necessary to correct the violation, without further notice the Secretary may declare a default under this Agreement effective on the date of such declaration of default and upon such default the Secretary may:

(a)(i) If the Secretary holds the note - declare the whole of said indebtedness immediately due and payable and then proceed with the foreclosure of the mortgage;

(ii) If said note is not held by the Secretary - notify the holder of the note of such default and request holder to declare a default under the note and mortgage, and holder after receiving such notice and request, but not otherwise, at its option, may declare the whole indebtedness due, and thereupon proceed with foreclosure of the mortgage, or assign the note and mortgage to the Secretary as provided in the Regulations;

(b) Collect all rents and charges in connection with the oepration of the project and use such collections to pay the

Owner's obligations under this Agreement and under the note and mortgage and the necessary expenses of preserving the property and operating the project;

(c) Take possession of the project. bring any action necessary to enforce any rights of the Onwers growing out of the project operation, and operate the project in accordance with the terms of this Agreement until such time as the Secretary in his discretion determines that the Owners again in a position to operate the project in accordance with the terms of this Agreement and in compliance with the requirements of the note and mortgage;

(d) Apply to any court, State or Federal, for specific performance of this Agreement, for an injunction against any violation of the Agreement, for the appointment of a receiver to take over and operate the project in accordance with the terms of the Agreement, or for such other relief as may be appropriate, since the injury to the Secretary arising from a default under any of the terms of this Agreement would be irreparable and the amount of damage would be difficult to ascertain.

2. As security for the payment due under this Agreement to the reserve fund for replacements, and to secure the Secretary because of his liability under

the endorsement of the note for insurance, and as security for the other obligations under this Agreement, the Owners respectively assign, pledge and mortgage to the Secretary their rights to the rents, profits, income and charges of whatsoever sort which they may receive or be entitled to receive from the operation of the mortgage property, subject, however, to any assignment of rents in the insured mortgage referred to herein. Until a default is declared under this Agreement, however, permission is granted to Owners to collect and retain under the provisions of this Agreement such rents, profit, income, and charges,

but upon default this permission is terminated as to all rents due or collected thereafter.

3. As used in this Agreement the term:

(a) "Mortgage" includes "Deed of Trust", "Chattel Mortgage", and any other security for the note identified herein, and endorsed for insurance or held by the Secretary;

(b) "Mortgagee" refers to the holder of the mortgage identified herein, its successors and assigns;

(c) "Owners" refers to the persons named in the first paragraph hereof and designated as "Owners, their successors, heirs and assigned";

(d) "Mortgaged Property" includes all property, real, personal, or mixed, covered by the mortgage or mortgages securing the note endorsed for insurance or held by the Secretary;

(e) "Project" includes the mortgaged property and all its other assets of whatsoever nature or whatsoever situate, used in or owned by the business on said morrgaged property, which business is providing housing and other activities as are incidental thereto;

(f) "Surplus Cash" means any cash remaining after:

(1) the payment of:

(i) All sums due or currently required to be paid under the terms of any mortgage

or note insured or held by the Secretary;

(ii) All amounts required to be deposited in the reserve fund for replacements;

(iii) All obligation of the project other than the insured mortgage unless funds for payment are set aside or deferment of payment has been approved by the Secretary; and

(2) the segregation of:

(i) An amount equal to the aggregate of all special funds required to be maintained by the project;

(ii) All tenant security deposits held;

(g) "Distribution" means any withdrawl or taking of cash or any assets of the project,

including the segregation of cash or assets for subsequent withdrawal within the limitations of Paragraph 6(e) hereof, and excluding payment for reasonable expenses incident to the operation and maintenance of the project.

(h) "Default" means a default declared by the Secretary when a violation of this Agreement is not corrected to his satisfaction within the time allowed by this Agreement or such further time as may be allowed by the Secretary after written notice;

(i) "Section" refers to Section of the National Housing Act, as amended.

14. This instrument shall bind, and the benefits shall inure to,

the respective Owners, their heirs, legal representatives, executors, administrators, successors, in office or interest, and assigns, and to the Secretary and his successors so long as the contract of mortgage insurance continues in effect, and during such further time as the Secretary shall be the owner, holder, or reinsurer of the mortgage, or obligated to reinsure the mortgage.

15. Owners warrant that they have not, and will not, execute any other agreement with provisions contradictory of, or in opposition to, the provisions hereof, and that, in any event, the requirements of this Agreement are paramount and controlling

as to the rights and obligations set forth and supersede any other requirements in conflict therewith.

16. The invalidity of any clause, part or provision of this Agreement shall not affect the validity or the remaining portions thereof.

17. The following Owners: ANGELO SANGIACOMO, ROSETTA SANGIACOMO and TWO THOUSAND BROADWAY, a limited partnership, do not assume personal liability for payments due under the note and mortgage, or for the payments to the reserve for replacements, or for matters not under their control, provided that said Owners shall remain liable under this Agreement only with respect to

the matters hereinafter stated; namely:

(a) for funds or property of the project coming into their hands which, by the provisions hereof, they are not entitled to retain; and

(b) for their own acts and deeds or acts and deeds of others which they have authorized in violation of the provisions hereof.

(To be executed with formalities for recording a deed to real estate)

APPENDIX N

1/CIVIL NO. 50140

IN THE COURT OF APPEAL

OF THE STATE OF CALIFORNIA

FIRST APPELLATE DISTRICT

DIVISION THREE

IRMA ZIGAS, ARTHUR L. ZIGAS, CONSTANCE C. PORTER, DAN F. PORTER, and LEE GLANZMAN, on behalf of themselves and all others similarly situated, Petitioners, vs. SUPEROR COURT OF THE STATE OF CALIFORNIA IN AND FOR THE CITY AND COUNTY OF SAN FRANCISCO, Respondent. ANGELO SANGIACOMO; TWO THOUSAND BROADWAY, a limited partnership; TRINITY PROPERTIES, INC., a corporation; TRINITY MANAGEMENT SERVICES, a corporation; DOES I through XX, inclusive; and BLACK & WHITE COMPANIES I through XX, inclusive, Real Parties In Interest	PETITION FOR REHEARING

To the Honorable Clinton W. White, Presiding Justice, and to The Honorable Sidney Feinberg and The Honorable James B. Scott, Associate Justices of the District Court of Appeal of the State of California, First Appellate District, Division Three.

Real Parties In Interest, Angelo Sangiacomo, Two Thousand Broadway, Trinity Properties, Inc. and Trinity Management Services, hereby petition for a rehearing to consider the decision filed in this Court in this action on June 24, 1981, on the grounds that the following substantial issues of law and fact were incorrectly stated or were not considered in the opinion:

1. The federal courts have pre-empted state law and held that interpretation and construction of the standard printed form HUD Regulatory Agreement is a matter of federal common law;

2. The third party beneficiary theory obstructs HUD's exercise of discretion in regulating and administering HUD insured projects and such exercise of discretion is judicially non-reviewable pursuant to 5 U.S.C. §§551(13) and 701(a)(2);

3. The standard printed form HUD Regulatory Agreement is the written embodiment of the Regulations promulgated under the NHA which this Court has recognized do not provide for statutory causes of action, and certain of the Petitioners' causes of action are indeed for the enforcement of a statutory right; and

4. The Court made the following further erroneous assumptions:

a. The building was <u>not</u> an affirmative family housing project, only a non-discriminatory project in terms of children;

b. The tenants of the building were not overcharged under the Regulatory Agreement;

c. There did exist an administrative procedure for resolution of disputes under the Regulatory Agreements;

d. The Regulatory Agreement specifically states that there are no third party beneficiary rights thereunder;

e. The enforcement provisions of the NHA are contained in 12 U.S.C. §1731a, 12 U.S.C. §1731 having been repealed in 1948;

f. In each of the federal court decisions cited by Real Parties the private landlord-mortgagors were also named as parties defendants and were being sued under third-party beneficiary theories; and

g. The Brinkman v. Urban Realty Co., Inc. (1952) 10 N.J. 113

decision cited by the Court was based upon Regulations promulgated under the NHA of 1942 which the decision itself acknowledges have long since expired or been amended.

* * *

Conclusion

For the foregoing reasons Real Parties request that a rehearing be granted and that this Court reconsider its opinion in light of federal decisional law, which pre-empts the application of state law to the interpretation and construction of the standard printed form HUD Regulatory Agreement.

Dated: July 7, 1981

Respectfully submitted,

MEADOWS, DORRIS, HARRIS & STRYKER

By /s/ Lance Stryker
Lance S. Stryker

Attorneys for Real Parties
In Interest

Opposition

Supreme Court, U.S.
FILED
JAN 9 1982
ALEXANDER L. STEVAS
CLERK

No. 81-1085

In the Supreme Court
of the
UNITED STATES

OCTOBER TERM, 1981

ANGELO SANGIACOMO, et al.,
Petitioners,
vs.
IRMA ZIGAS, et al.,
Respondents.

OPPOSITION TO PETITION FOR WRIT OF CERTIORARI
to the Supreme Court of the State of California

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QUESTIONS PRESENTED

1. Whether the order of the California court is a final judgment or decree so that this court has jurisdiction over the Petition under 28 U.S.C. §1257(3).

2. Whether the California court's order rests on adequate non-federal grounds.

3. Whether the petition raises substantial federal questions.

4. Whether the California court's order conflicts with federal appellate court decisions.

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STATEMENT OF THE CASE

A detailed statement of the case is attached as Appendix A. The salient points of the proceedings may be summarized as follows.

The Complaint alleges that the defendants (petitioners here) constructed an apartment building in San Francisco financed by a mortgage insured by United States Department of Housing and Urban Development (hereinafter, "HUD"). The defendants and HUD entered into a series of agreements which prohibited the defendants from charging rentals higher than those approved by HUD. Despite these agreements, the defendants proceeded to raise the rents several times, without obtaining HUD approval, all in violation of the express terms of the agreements, and thus exacted some $2,000,000 in additional rent from plaintiffs (respondents here) and others similarly situated.

The Complaint, as amended, proceeded on the following theories:

a. That the plaintiffs are third party beneficiaries of the agreements between landlord and HUD;

b. Promissory fraud on the part of the defendants;

c. Breach of the rental agreements between the defendants and the plaintiffs;

d. Mistake, and intentional and negligent misrepresentation;

e. An implied statutory cause of action under the National Housing Act and its regulations (this claim was dropped);

f. Claims based upon the defendants' attempted wrongful eviction of the plaintiffs;

g. Unjust enrichment;

h. Declaratory relief; and

i. Breach of express and constructive trusts.

The California trial court sustained demurrers and a motion to strike eliminating claims based on the third party beneficiary, fraud, breach of rental agreements, implied right of action under the statute, breach of constructive and express trust theories.

Plaintiffs then petitioned the California Court of Appeal for an order overruling the demurrers and reversing the motion to strike. Plaintiffs did not seek review of the lower court's ruling on the implied federal statutory right of action theory, which was abandoned.

The California Court of Appeal has ordered the demurrers and motion to strike overruled, finding that the Complaint states a cause of action under state law.

The defendants petitioned the California Supreme Court for a hearing, which was denied. The defendants then removed the case to federal district court, and filed a motion to dismiss, making essentially the same arguments presented to the California courts and raised again in their petition here. Plaintiffs filed a motion to remand the case to state court. Both motions are still under submission.

The following steps remain in this litigation:

a. Determination of the removal to federal district court and motion to dismiss;

b. The defendants' filing of an answer to third party beneficiary related claims;

c. Class certification (the Local Rules in state court prohibit a motion for class certification until the case is at-issue);

d. The completion of discovery; and

e. Trial.

REASONS FOR DENIAL OF THE WRIT

1. This Court lacks jurisdiction in that the California Court's order is not a final judgment or decree.

28 U.S.C. §1257 provides for jurisdiction only in the event of a final judgment or decree. As noted in the foregoing statement of the case, the instant litigation is far from over. After determination of the petitioners' removal of this case to federal district court and motion to dismiss (presently pending), an answer to all claims must be filed, the class certified, discovery completed, and a trial had on all issues.

The decision of the California court, which petitioners seek to reverse, overruled their demurrers to the complaint and remanded the case for further proceedings.

This court has dealt specifically with the kind of decision rendered by the California court below. In Pope v. Atlantic Coast Line R. Co., 345 U.S. 379 (1953), the court noted that, ordinarily, the overruling of a demurrer is not a final judgment or decree within the meaning of the jurisdictional statute. The only exception to this rule is explained in Mills v. Alabama, 384 U.S. 214 (1966), where a demurrer to a criminal complaint was sustained on federal constitutional grounds by a state trial court. The state Supreme Court reversed, remanding for jury trial. This court took jurisdiction on the reasoning that the appellant conceded that he had

no defense other than his federal claim and could not prevail at trial on the facts on any non-federal ground.

The defendants in this case have by no means conceded the charging allegations of any part of the complaint, much less those discussed by the California court.

Not the least of the issues remaining to be determined is damages. This fact alone is sufficient to obviate finality:

> "The requirement of finality has not been met merely because the major issues in the case have been decided and only a few loose ends remain to be tied up - for example, where liability has been determined and all that needs to be adjudicated is the amount of damages. Republic Natural Gas v. Oklahoma, 334 U.S. 62 (1948).

In the face of the plainly non-final status of this case, the petitioners argue that this Court's decision in Cox Broadcasting Corp. v. Cohn, 420 U.S. 469 (1975) makes the California Court's decision ripe for review. Specifically, petitioners rely on the fourth factor discussed in that case. The operative language in that decision clearly rebuts the petitioners' argument here:

> ". . . where reversal of the state court on the federal issue would be preclusive of any further litigation on the relevant cause of action rather than merely controlling the

> nature and character of, or determining the admissibility of evidence in, the state proceedings still to come. In these circumstances, if a refusal immediately to review the state court decision might seriously erode federal policy, the Court has entertained and decided the federal issue, which itself has been finally determined by the state courts for purposes of the state litigation." Cox Broadcasting, supra, 482-483 (Emphasis added).

No substantial federal issue was decided by the state court (see infra). If there were a federal issue, petitioners have argued in their removal to the federal district court that the very same issues which they raise in this petition ought to be decided in that court. If petitioners' argument were well taken, and if petitioners had not waived federal jurisdiction, then the matter remains to be decided in federal district court. If, on the other hand, the state court decision is found by the district court not to have given rise to federal jurisdiction, or if the petitioners have waived it, the matter will return to state court. In either event, a substantial amount of litigation remains before the case becomes ripe for review.

2. The California Court's Order Rests on Substantial Non-Federal Grounds.

If the state court decides only non-federal questions, or decides both federal and non-federal questions, the Supreme Court has no jurisdiction to review if

the non-federal ground is adequate to support the judgment. Herb v. Pitcairn, 324 U.S. 117 (1954).

Petitioners concede this point:

> "The Supreme Court of California, by refusing a hearing on this matter, has finally adjudicated the issue of whether under California state law principles respondents have stated a cause of action." (Petition, page 12, emphasis added).

A review of the decision of the Court of Appeal (Petitioner's Appendix A) confirms this basis for its decision. The court extensively examined California law and found that respondents' complaint states a claim under California law governing third party beneficiary and unjust enrichment actions.

3. The Petition Fails to Raise Substantial Federal Questions.

To afford the basis for review by certiorari, a petition must raise a substantial federal question. Dickson v. Duffy, 342 U.S. 33 (1951).

Petitioners argue here (as they argued below) that:

> "'. . . The California Supreme Court's decision in Martinez is dispositive of the issues presently before this court.'" (Petition, page 5).

Petitioners go on to argue that the California court's decision here is contrary to California legal precedent.

The focus of petitioners' argument in the California courts has been on California law.

Petitioners now apparently claim, as a federal issue, the question of whether state or federal law applies to the contracts in this lawsuit.

Petitioners' contentions in the California court as to whether California law or federal common law should apply to the issue of the plaintiffs' third party beneficiary rights were far from clear. (See page A-4 of Petitioners' Appendix A). In any event, the issue is settled by this court's decision in Miree v. DeKalb County, 433 U.S. 25 (1977). (See Petitioners' Appendix, pages A-8 through A-12). The federal appellate courts have followed Miree to find that third-party beneficiary rights under contracts based on the National Housing Act should be decided under state law. Pankow Construction Company v. Advance Mortgage Corporation, 618 F.2d 611 (9th Cir. 1980); to the same effect, Madsen v. Prudential Federal Savings & Loan Assoc., 635 F.2d 797 (10th Cir. 1980).

Petitioners, by way of arguing the federal aspects of this case, shed crocodile tears at the prospect of tenants suing HUD. Respondents have not sued HUD, and the California court's decision plainly would not allow a suit against HUD to enforce the rights of the tenants. HUD is not a party to this case, has not sought to become a party, and has expressed no disagreement with the decision of the California court.

4. The California Court's Order Does Not Conflict With Federal Appellate Court Decisions.

Petitioners argue at length that various federal court decisions stand for the principle that the National Housing Act does not create a federal statutory right of action for the tenants of HUD projects. On this point, the California court expressly agreed. (Petitioners' Appendix, page A-13).

Petitioners have cited the same federal cases to this court that they cited to the California courts and to the federal district court. As noted above, the California court expressly agreed with the federal cases holding that there is no federal statutory right of action. The balance of the cases relied upon by petitioners involved lawsuits against HUD. Particularly, the petitioners rely on Falzarano v. United States, 607 F.2d 506 (1st Cir. 1979). As the California court noted, Falzarano and the other cases relied on by the petitioners involved situations where the tenants were contesting HUD approved rent increases. (Petitioners' Appendix, pages A-30 through A-31). The plaintiffs in the Falzarano case accused the defendants of "siphoning off funds". There is no clear reference to specific terms of a contract governing the rents to be charged by the landlords. The statute quoted by the court has to do with the proscription of mortgages over a certain limit. (Petitioners' Appendix, pages L-5 through L-7). The plaintiffs in Falzarano asserted federal jurisdiction based on federal common law

claims. The case simply did not deal with third party beneficiary rights of tenants based on state law, and found federal jurisdiction lacking.

Far from disagreeing with the federal cases, the California court noted that allowing a suit by the tenants to challenge HUD approved rentals could easily frustrate the Secretary's policy. In contrast, the lawsuit in question here will only serve to effectuate the Secretary's policies.

Respondents here have not questioned the propriety of HUD's actions, much less made HUD a defendant in this case. Since the petitioners never sought HUD approval of their rent increases, HUD was never called upon to act. In the absence of requests for rental increases, HUD's inaction is easily understandable.

None of the federal court decisions relied on by the petitioners has construed California law in connection with this or any other contract.

CONCLUSION

The petitioners in this case have used every known vehicle to delay the litigation. Their petition is but one more dilatory tactic, and should be denied forthwith so that this case may go to trial.

Dated: January 7, 1981

San Francisco

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APPENDIX A

DETAILED STATEMENT OF THE CASE

On June 1, 1979, plaintiffs/respondents brought this class action for damages and injunctive and declaratory relief on behalf of themselves and all other past and present tenants of an apartment building located at 2000 Broadway in San Francisco.

The relevant allegations in the complaint are the following. The 2000 Broadway building was constructed in the early 1970's by defendants/petitioners, and financed by a mortgage in excess of $5,000,000, insured by the United States Department of Housing and Urban Development (hereinafter referred to as "HUD"). The terms of that mortgage provided that repayment was to be made over a 40 year period, and that the interest rate charged to defendants was 7% per annum. That mortgage was insured pursuant to the National Housing Act of 1949 (12 U.S.C. Section 1701, et seq., as amended, hereinafter referred to as the "Act"), and the regulations promulgated by the Secretary of HUD thereunder (24 C.F.R. 207 et seq.).

HUD entered into a series of agreements with the owner of the project, defendant TWO THOUSAND BROADWAY, a limited partnership of which defendant ANGELO SANGIACOMO (hereinafter "SANGIACOMO") is the sole general partner. Under the terms of (1) the Regulatory Agreement for Multi-Family Housing Projects (hereinafter referred to as "Regulatory Agreement"), which is attached to the complaint as Exhibit A, (2) a written rental schedule executed by defendant SANGIACOMO setting forth the maximum

rentals that could be charged at the 2000 Broadway premises, which is attached to the complaint as Exhibit B, and (3) a letter of approval from HUD of the maximum rental amounts set forth in the rental schedule, which is attached to the complaint as Exhibit C, defendants agreed to be bound by the specific maximum rental amounts set forth in those agreements. The Regulatory Agreement was executed on or about December 7, 1971, the rental schedule was executed on or about August 28, 1973, and HUD's letter of approval was sent to defendants on or about November 20, 1973. The Regulatory Agreement and the HUD letter of approval required the defendants to obtain prior written approval from HUD before charging tenants any amount in excess of the rents set forth in the written rental schedule. The Complaint alleges that no increases in these rentals have ever been sought by defendants or approved by HUD and that the defendants have charged the tenants of 2000 Broadway rents for in excess of those allowed under their agreements.

Some time after November 20, 1973, defendants further breached the terms of the agreements entered into with HUD by charging members of the plaintiff class non-refundable and non-refunded $75 fees, characterizing such fees as "rental fees" and other types of fees. None of these fees or charges were ever approved by HUD.

From this core of facts, and other facts not relevant in this proceeding, the complaint alleged thirteen causes of action: (1) breach of contract, on the theory that plaintiffs and the class of tenants that

they represent are intended third-party beneficiaries of the Regulatory Agreement and the contract established by the written maximum rental schedule and the HUD letter of approval of that schedule; (2) specific performance, based on the same third-party beneficiary theory; (3) fraud, based on the allegation that defendants entered into the agreements with HUD with the intention not to perform their obligations under the agreements; (4) breach of rental agreements executed with the members of the plaintiff class, based on the allegation that an implied term of each rental agreement provided that the rental agreement was legally enforceable and complied with all applicable regulations, including the regulations promulgated by HUD under the National Housing Act and the obligations of defendants under their agreements with HUD; (5) mistake of fact, based on the allegation that the members of the plaintiff class, at the time they entered into their rental agreements, were ignorant of the provisions of the agreements entered into between defendants and HUD, that defendants were aware that the rentals and other fees charged in the rental agreements were in excess of those allowed in those agreements and were aware of the tenants' lack of knowledge of these facts; (6) intentional misrepresentation, based on allegations similar to (5) above, but also based on the intentional suppression from the tenants of the fact that under the defendants' agreements with HUD the rents and fees charged to the tenants were excessive; (7) negligent misrepresentation, based on allegations similar to (6) above; (8) a cause of action

alleging an implied right of action for damages based on defendants' violation of 24 C.F.R. §207.19(e), a regulation promulgated pursuant to §207 of the National Housing Act (12 U.S.C. §1713), which states that the mortgagor shall make no charge to tenants of such HUD-insured projects in excess of those approved by HUD in writing prior to the opening of the project for rent; (9) a cause of action for an injunction to enjoin defendants from threatened eviction proceedings against plaintiffs and other tenants in retaliation against the tenants' assembling together and petitioning the San Francisco Board of Supervisors and other governmental agencies to prevent defendants from carrying out their announcement of additional rental increases; (10) intentional infliction of mental distress, based in general on the same facts alleged in (9) above; (11) negligent infliction of mental distress, based on allegations similar to (9) and (10) above; (12) money had and received, a common count alleging unjust enrichment; and (13) declaratory relief, based on the allegation that the $75 "rental fee" is a "security" as defined in Section 1950.5 of the Civil Code and thus, pursuant to Section 1950.5 of the Civil Code, is to be refunded to members of the plaintiff class on expiration of each tenancy.

Defendants, on or about August 6, 1979, filed a demurrer to the complaint, alleging that the complaint, and each cause of action, failed to state facts sufficient to constitute valid causes of actions.

The Superior Court, on October 25, 1979, entered a minute order sustaining the demurrer without leave to amend as to the First and Second Causes of Action. The First Cause of Action of the original complaint sought damages and attorneys' fees for defendants' breaches of their contracts entered into with HUD, i.e., the Regulatory Agreement, the maximum rental schedule and the letter of approval. The only legal theory espoused by plaintiffs in that original First Cause of Action was the assertion that plaintiffs, as third party beneficiaries of the contracts entered into by defendants and HUD, could sue defendants for breaches of those contracts. Similarly, the Second Cause of Action of the original complaint sought specific performance and injunctive relief from defendants again because of their alleged breaches of the various contracts entered into between themselves and HUD, and sought such relief on the same third party beneficiary theory.

Plaintiffs filed their First Amended Complaint on December 13, 1979, which deleted the First and Second Causes of Action of the original complaint which were based on a third party beneficiary theory. The First Amended Complaint contained the causes of action which the court had sustained with leave to amend, altering the allegations to some degree, and deleting any references to third party beneficiary allegations. In addition, the First Amended Complaint added several new causes of action, including a statutory cause of action under Civil Code Section 1950.5 and Business and Professions Code

Section 17200 et seq. (Twelfth Cause of Action); Breach of Constructive Trust (Thirteenth Cause of Action) and Breach of Express Trust (Fourteenth and Fifteenth Causes of Action).

The defendants on or about January 31, 1980, then filed a demurrer to the First Amended Complaint and motion to strike a number of allegations in that pleading. The demurrer alleged that each of the causes of action of the First Amended Complaint failed "to state facts sufficient to constitute a cause of action based on, or derivative of, a federally insured housing mortgage under the National Housting Act."...", etc. The motion to strike sought to strike from the First Amended Complaint every reference to the Regulatory Agreement, the maximum rental schedule, and the HUD letter of approval of the maximum rental schedule, and (since copies of these three documents were, respectively, Exhibits A, B, and C to the First Amended Complaint) the motion to strike sought to strike these three exhibits to the First Amended Complaint.

After a hearing, the Superior Court entered a minute order on May 13, 1980, sustaining the demurrer without leave to amend the following causes of action of the First Amended Complaint: The First (fraud), Second (Breach of Rental Agreements), Sixth (Implied Right of Action based on Violation of Federal Regulations), Thirteenth (Breach of Constructive Trust), Fourteenth (Breach of Express Trust), and Fifteenth (Breach of Express Trust). Furthermore, defendants' motion to strike was

granted as to various allegations in the First Amended Complaint and as to Exhibit A, B, and C to the First Amended Complaint - i.e., the Regulatory Agreement, the maximum rental schedule, and the HUD letter of approval. The allegations which the Superior Court struck were all the references in the First Amended Complaint to the agreements between defendants and HUD, and the National Housing Act, as well as any allegations concerning the rights of plaintiffs or the class of tenants to rely on these agreements or the National Housing Act in any of the causes of action in the First Amended Complaint.

Although the minute order of May 13, 1980 gave no reason for the Superior Court's decision, it is presumably based on defendants' arguments in their memorandum of points and authorities. Defendants argued that these causes of action, and the correlative allegations concerning the HUD agreements, the National Housing Act, and the regulations promulgated thereunder could not, as a matter of law, support any cause of action, and that plaintiffs had no standing or right to enforce any of these provisions.

The effect of the Superior Court's two minute orders was to bar a substantial portion of plaintiffs' claims from being heard on the merits. Plaintiffs were barred from attempting to obtain, on their own behalf or on behalf of all of the other tenants, the repayment of the amount of the rents which they paid defendants which were in excess of the rents defendants were permitted to charge the tenants under the agreements with HUD. The

plaintiffs were barred from such recovery under any of their causes of action, even those which survived the two demurrers.

The defendants have denied the charging allegations of the complaint, except for the claims to which they demurred.

The plaintiffs, on July 16, 1980, filed their petition for writ of mandate in the First District Court of Appeal, asserting that the complaint and the First Amended Complaint stated valid causes of action seeking to recover the rental overcharges. Plaintiffs asked the Court of Appeal for a writ directing the Superior Court to set aside its orders sustaining the general demurrers and granting the motion to strike. However, the plaintiffs, in their petition for a writ, did not take issue with the Superior Court's ruling on plaintiffs' implied federal statutory right of action theory under the National Housing Act and the regulations promulgated thereunder. This was the Eighth Cause of Action of the original complaint and the Sixth Cause of Action of the First Amended Complaint. Thus, plaintiffs' petition for a writ did not assert that the National Housing Act and the Regulations promulgated thereunder create a federal statutory right of action in plaintiffs. Instead, plaintiffs relied entirely on their various causes of action under applicable state law. See Petition for Writ of Mandate, pages 16-17, paragraph 15, and see page 8, lines 4-13, of the plaintiffs' Reply to Written Return to Alternative Writ of Mandate, and page 10, line 23 through

page 11, line 8 of plaintiffs' Answer to Petition for Hearing by the California Supreme Court.

On or about June 24, 1981, the Court of Appeal of the State of California issued its opinion granting plaintiffs' writ of mandate. The Court of Appeal held that plaintiffs had stated causes of action under state law. A copy of the Court of Appeal's opinion is attached as Appendix A to the Petition for Certiorari.

The Court of Appeal denied defendants' request for re-hearing on or about July 24, 1981.

The defendants then petitioned the California Supreme Court for a hearing after the decision by the California Court of Appeal. The California Supreme Court denied defendants' petition for a hearing on or about September 10, 1981. A copy of the notification by the California Supreme Court is attached as Appendix C to the Petition for Certiorari.

Defendants then removed the case to federal district court. Plaintiffs filed a motion to remand the case to state court and defendants also filed a motion to dismiss the complaint. Both motions are still pending in federal district court.

After a decision is rendered on the removal, remand, and dismissal by the federal district court, the defendants must answer the subject allegations of the complaint. Then, the class must by certified, discovery completed, and a trial be had.